Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

General Notice

TARIFF CLASSIFICATION OF ANNULAR, CORRUGATED FLEXIBLE METAL HOSE: EXTENSION OF TIME FOR COMMENTS

AGENCY: Customs Service, Treasury.

ACTION: Extension of time for comments.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the tariff classification of annular, corrugated flexible metal hose. A notice inviting the public to comment on the Customs Service's reconsideration of its position regarding tariff classification of this merchandise was published in the Federal Register on October 23, 1987 (52 FR 39662), and comments were to have been received on or before November 23, 1987. A request has been received to extend the period of time for comments an additional 30 days. In view of the complexity of the issues involved, the request is being granted.

DATE: Comments will now be accepted if received on or before December 23, 1987.

ADDRESS: Comments should be submitted to and may be inspected at the Regulations and Disclosure Law Branch, Room 2324, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202–566–8181).

Dated: December 10, 1987.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, December 15, 1987 (52 FR 47601)]

U.S. Customs Service

Proposed Rulemakings

19 CFR Parts 128 and 143

PROCEDURES FOR CLEARANCE OF CARGO CARRIED BY EXPRESS CONSIGNMENT OPERATORS OR CARRIERS

AGENCY: Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs regulations to set forth revised special informal entry procedures applicable to the entry and clearance of cargo carried by the various entities which comprise the express consignment industry. These regulations would further refine and expand the existing procedures which recognize the special needs of this growing industry. The member countries of the Customs Cooperation Council have recently examined the industry and associated issues and have adopted international guidelines which established various definitions, including the term "Express Consignment Operators or Carriers".

The overwhelming growth of this industry, which is expected to continue, requires Customs to provide more expedited clearance procedures. The proposed amendments would further promote uniform, fair, and consistent treatment of the various courier and express services, while at the same time better assuring the protection of the revenue in accord with all applicable laws and regulations.

DATE: Comments must be received on or before February 16, 1988.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Customs Service Headquarters, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Comments relating to the information collection aspects of the proposal should be addressed to Customs, as noted above, and also the Office of Information and Regulatory Affairs, Attention: Desk Officer for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Operational aspects: Vincent Dantone, Office of Inspection and Control (202–566–5354); Legal aspects: Jerry Laderberg, Entry Procedures & Penalties Division (202–566–5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

All imported merchandise entering the customs territory of the U.S. is subject to procedures relating to entry and clearance. The procedures ensure the proper appraisement, valuation, and tariff classification of the merchandise for the purpose of collecting the lawful amount of duties, as well as compliance with all other laws and regulations administered and enforced by Customs. Different procedures are provided for the entry and clearance of merchandise depending upon its value. There are formal entry procedures set forth in Part 141, Customs Regulations (19 CFR Part 141), with certain exceptions, applicable to shipments of merchandise valued in excess of $1000, and informal entry procedures set forth in Part 143, Customs Regulations (19 CFR Part 143), for the most part limited to shipments of merchandise valued at $1000 or less.

Although the procedures for the informal entry of merchandise are less cumbersome and comprehensive than those for formal entry, they may still present an impediment to courier and express services.

The trend in the express consignment industry for time sensitive clearance of cargo and the processing of entry documents is well recognized by Customs. Because of the special needs of the growing express consignment industry, by T.D. 86–143, published in the Federal Register of July 22, 1986 (51 FR 26243), informal entry procedures were set forth in §§ 143.21(1) and 143.29, Customs Regulations (19 CFR 143.21(1), 143.29). These procedures have helped the industry and Customs cope with an ever increasing workload. However, Customs recognizes that the procedures could be improved. In reaching this conclusion, Customs has noted that major express consignment companies have averaged over a 400% increase in imported cargo carried during the last 2 years while Customs staffing levels have remained static at express industry facilities due to manpower constraints. Further, a 150% increase in volume is expected in the coming year. The Customs Cooperation Council recently examined the express consignment industry. It noted the problems raised by on-board and fast parcel services as well as the time-sensitive nature of such consignments. The Council's study, as noted in the May 1, 1987 report of its Permanent Technical Committee (Document 34.040), highlighted the need for the Customs service of the Council's member countries to provide a rapid reliable control and clearance system for this type of traffic.

It has now been determined that more detailed and accurate information from the express consignment industry and its participation in the Customs data processing systems is necessary for Customs to streamline its processing. By providing certain advance information on incoming shipments through the automated data processing systems, and full reimbursement for services rendered,

Customs would be able to assist the industry in expeditiously processing the workload while maintaining our enforcement posture.

PROPOSAL

To set forth revised special informal entry procedures applicable to the express consignment industry, it is proposed to amend the Customs Regulations in title 19, Code of Federal Regulations (19 CFR Chapter I), by adding a new Part 128, Customs Regulations (19 CFR Part 128). The proposed new Part 128 defines an express consignment operator or carrier and certain other terms. It establishes an approval process for express consignment facilities that, in addition to other requirements, mandates participation in Customs data processing systems for entry and entry release processing. These procedures would be available to all operators, carriers, and other entities that can meet the criteria set out in these regulations.

Two types of installations presently utilized by the express consignment industry would be recognized. The first is a centralized hub facility which is a separate, unique, single purpose facility normally operating outside of Customs operating hours. The facility would have to be approved by the district director for entry filing, examination and release of express consignment shipments. The second is the express consignment carrier facility, which is a separate or shared specialized facility approved by the district director solely for the examination and release of express consignment shipments.

Because of the high volume of entries that the major overnight courier services handle under existing criteria, they could qualify to be designated as a port of entry. As such, Customs inspectional services would be provided at all times at no additional cost to the courier service. All expenses for providing the service would be allocated out of the annual Customs budget appropriations as at other designated ports of entry. Currently, in accordance with the User Charges Statute (31 U.S.C. 9701), the courier services must reimburse Customs for inspectional services occurring at places other than established ports of entry. This user fee statute was enacted to ensure that Federal Governmental services provided to individual recipients, as opposed to the general public, are self-sustaining to the greatest extent possible. The potential establishment of separate ports of entry for individual couriers would, in effect, be contrary to the Congressional intent concerning the user fee statute. Accordingly, by T.D. 87–65, published in the Federal Register of May 4, 1987 (52 FR 16328), the port of entry workload criteria were slightly modified to provide that no more than half of the minimum 2500 consumption entries to be filed at a port of entry can be attributed to one private party, which must generally compensate the Government for service provided under 31 U.S.C. 9701.

The proposed new regulations incorporate the current provisions of §§ 143.21(1) and 143.29, Customs Regulations (19 CFR 143.21(1),

143.29), with the following modifications. They provide for the filing of a written application and a process for Customs approval of express consignment and hub facilities; establish advance manifest requirements; establish bond requirements; generally raise the informal entry ceiling to $1250 for those qualifying to use the procedures; eliminate the distinction between shipments valued at $250 or less and those valued in excess thereof; raise the value level of shipments which must be segregated if an advance manifest is used, from $5.00 to $25.00; streamline informal and formal entry procedures; require that all entry numbers be furnished to Customs in a Customs approved bar coded readable format; and permit the district director to waive production of entry documentation in certain cases. The district director's current authority to require the consolidation of shipments under one entry would also be extended. These amendments would further promote uniform, fair, and consistent treatment of the various courier and express services and make the procedures available to all operators, carriers, and other entities that can meet the criteria, while at the same time better assuring the protection of the revenue in accord with all applicable laws and regulations. Meetings have been held with industry representatives to advise them of the procedural changes and the benefits that will accrue to their industry if the changes are adopted.

The proposed new Part 128 provides for an application processing fee in connection with the facility approval process. It is Customs intent to initially implement a two tiered fee system. A $500 fee would apply to the approval of facilities in existence at the time final regulations are published and to facilities which are changed or altered after having been previously approved. This would cover the expenses of the district director's review of and response to the application, review of the proposed procedures by the port director and higher level Customs officials, as well as appropriate administrative costs. An application fee of $1000 would apply to the approval of new or expanded facilities. This fee would cover, in addition to the expenses noted above, facility design review, including blueprint review for work flow and cargo security purposes, on-site meetings between company and Customs officials to discuss the facility design and the company's operational and procedural proposals. This fee system would be reviewed and revised periodically to reflect changes in processing expenses. Changes in the fee system would be published in the Federal Register and the CUSTOMS BULLETIN.

COMMENTS

Before adopting these proposed regulations, consideration will be given to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4),

and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

E.O. 12291 and Regulatory Flexibility Act

Because the proposed amendments do not meet the criteria for a "major rule" within the meaning of E.O. 12291, a regulatory impact analysis is not necessary. Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments would not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The proposed regulations are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Accordingly, the document has been submitted to the Office of Management and Budget for review and comment pursuant to 44 U.S.C. 3504(h). Public comments relating to the information collection aspects of the proposal should be addressed to the Office of Information and Regulatory Affairs, Attention: Desk Office for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20503. A copy of the comments to the Office of Management and Budget should also be sent to Customs at the address set forth in the ADDRESS portion of this document.

Drafting Information

The principal author of this document was Arnold L. Sarasky, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 128

Carriers, Couriers, Customs duties and inspection, Express consignments, and Imports.

19 CFR Part 143

Customs duties and inspection, Imports.

Proposed Amendments to the Regulations

It is proposed to amend title 19, Chapter I, Code of Federal Regulations, by adding a new Part 128, Customs Regulations (19 CFR Part 128), and to amend Part 143, Customs Regulations (19 CFR Part 143), by removing §§ 143.21(1) and 143.29, as set forth below:

PART 128—EXPRESS CONSIGNMENTS

1. The authority citation for Part 128 would read as follows:

Authority: 19 U.S.C. 66, 1202 (Gen. Hdnote. 11), 1484, 1498, 1551, 1555, 1556, 1565, 1624.

2. Chapter I of title 19, Code of Federal Regulations (19 CFR Chapter I) would be amended by adding a new Part 128 to read as follows:

PART 128—EXPRESS CONSIGNMENTS

SUBPART A—GENERAL

§ 128.0 Scope.

§ 128.1 Definitions.

SUBPART B—ADMINISTRATION

§ 128.2 Express consignment carrier application and approval process.

SUBPART C—PROCEDURES

§ 128.3 Manifest requirements.

§ 128.4 Bonds.

§ 128.5 Articles not requiring entry.

§ 128.6 Informal entry procedures.

§ 128.7 Formal entry procedures.

§ 128.8 Simplified entry document procedures.

SUBPART A—GENERAL

§ 128.0 Scope.

This part sets forth requirements and procedures for the clearance of imported merchandise carried by express consignment operators and carriers, including couriers, under special procedures.

§ 128.1 Definitions.

For the purpose of this part:

(a) *Express consignment operator or carrier.* An "Express consignment operator or carrier" is a company operating in any mode or intermodally moving cargo by special express commercial service under closely integrated administrative control. Its services are offered to the public under advertised, guaranteed timely delivery on a door-to-door basis. An express consignment operator assumes liability to Customs for the articles in the same manner as if it is the sole carrier.

(b) *Cargo.* "Cargo" means any and all shipments imported into the customs territory of the United States by an express consign-

ment operator or carrier whether manifested, accompanied, or unaccompanied.

(c) *Courier shipment.* A "courier shipment" is an accompanied express consignment shipment.

(d) *Hub.* A "Hub" is a separate, unique, single purpose facility normally operating outside of Customs operating hours approved by the district director for entry filing, examination, and release of express consignment shipments.

(e) *Express consignment carrier facility.* An "express consignment carrier facility" is a separate or shared specialized facility approved by the district director solely for the examination and release of express consignment shipments.

(f) *Closely integrated administrative control.* The term "closely integrated administrative control" means operations must be sufficiently integrated at both ends of the service (pick-up and delivery) so that the express consignment company can exercise a high degree of control over the shipments, particularly in regard to the reliability of information supplied for Customs purposes. Such control would be implemented by substantial common ownership between the local company and the foreign affiliate and/or by a very close contractual relationship between the local company and its foreign affiliate(s) (*e.g.,* a franchise arrangement).

(g) *Reimbursable.* "Reimbursable" means all costs, including normal and special enforcement operations, incurred at an express consignment operator's hub or an express consignment carrier facility that are required to be reimbursed to the Government.

SUBPART B—ADMINISTRATION

§ 128.2 Express consignment carrier application and approval process.

(a) *Facility application.* Requests for approval of an express consignment carrier or hub facility must be in writing to the district director.

(b) *Application contents.* The application for approval of a express consignment carrier or hub facility must include the following:

(1) A full description of the facilities, including blueprints, floor plans and facility location(s).

(2) Statement of the general character of the express consignment operations.

(3) Estimated volume of transactions by:

(i) Formal entries.

(ii) Informal entries.

(iii) Shipments not requiring entry (see § 128.5).

(4) Application processing fee, as set forth in paragraph (e).

(5) List of principal company officials or officers.

(6) Projected start-up date, days and hours of operation.

(7) An agreement that the express consignment company will:

(i) Ensure that all cargo will be processed in the Customs Automated Commercial System (ACS) and associated modules, including, but not limited to Automated Broker Interface (ABI), Automated Manifest System (AMS), Cargo Selectivity, and Statement Processing.

(ii) Sign and implement a narcotics enforcement agreement with Customs.

(iii) Provide without cost to the Government, adequate office space, equipment, furnishings, supplies and security according to Customs specifications.

(iv) Timely pay all reimbursable costs, as determined by the district director.

(v) Pay to Customs all relocation, training and other costs and expenses incurred by Customs in relocating necessary staff to the company's hub express consignment carrier facility to provide or service to the company and to pay expenses incurred by Customs due to termination or decline of operations at the facility.

(c) *Changes or alterations to facility.* All proposed changes or alterations to an existing facility must be submitted in writing to the district director for approval prior to the implementation thereof and shall contain the information specified in paragraph (b).

(d) *Appeal of denial of application.* Any express consignment operator or carrier denied approval by the district director may file a written appeal with the appropriate regional commissioner within 14 calendar days from the date of denial.

(e) *Application processing fee.* Each operator of an express consignment hub or carrier facility will be charged a fee to establish, alter, or relocate such facility which shall be determined under the provisions of 31 U.S.C. 9701. The fee will be periodically reviewed and revised to reflect changes in processing expenses and any changes thereto will be published in the Federal Register and CUSTOMS BULLETIN.

SUBPART C—PROCEDURES

§ 128.3 Manifest requirements.

(a) *Additional information.* Express consignment operators and carriers shall provide the following manifest information in advance of the arrival of all shipments in addition to the information and documents otherwise required by the Customs Regulations:

(1) Country of origin of the merchandise.

(2) Shipper name, address and country.

(3) Ultimate consignee name and address.

(4) Specific description of the merchandise with tariff item numbers. All articles for which an entry is not required as noted in § 128.5 shall be separately listed and their entry exemption status noted.

(5) Quantity.

(6) Shipping weight.
(7) Value.

(b) *Sorting of cargo.* If shipments are sorted by country of origin of the merchandise when they arrive at the hub or express consignment facility or are so presented to Customs, the advance manifest information shall also be so listed.

(c) *Explanation of manifest amendments.* Amendments to the manifest to report shortages (merchandise manifested but not found) or overages (merchandise found but not manifested) shall be made on Customs Form 5931 and submitted to Customs within 72 hours of the arrival and entry of the importing conveyance.

§ 128.4 Bonds

All express consignment operators or carriers shall be recognized by Customs as an international carrier, be approved as a carrier of bonded merchandise and have filed bonds on Customs Form 301, containing the bond conditions set forth in §§ 113.62, 113.63 and 113.64 of this chapter, to insure compliance with Customs requirements related to the importation and entry of merchandise as well as the carriage and custody of merchandise under Customs control.

§ 128.5 Articles not requiring entry.

All articles carried by an express consignment operator or carrier shall be entered except for those specifically exempt from entry by § 321, Tariff Act of 1930, as amended (19 U.S.C. 1321), and General Headnote 5, Tariff Schedules of the United States (19 U.S.C. 1202).

§ 128.6 Informal entry procedures.

(a) *Eligibility.* Informal entry procedures may generally be used for shipments not exceeding $1250 in value which are imported by express consignment operators and carriers. Such procedures, however, may not be used for prohibited or restricted merchandise, merchandise which is subject to a quota or other quantitative restraints, or in any instance in which the district director may require a formal entry under the provisions of § 143.22 of this chapter. In such case, individual shipments for the same consignee valued at $1250 or less may be consolidated on one entry.

(b) *Procedures.* Customs Form 3461, appropriately modified to cover all importations under the special procedures contained in this Part shall be submitted on a yearly basis with the first such form submitted prior to the commencement of hub or express consignment carrier facility operations. The party with the right to file entry may submit a copy of the invoice or the advance manifest, as described in § 128.3 in lieu of other control documents.

(c) *Alternative procedure.* The party with the right to file entry may be required to submit an individual Customs Form 3461 covering the eligible shipments on a daily basis or by flight basis. Commercial invoices or advance manifests shall be attached to the Customs Form 3461 which shall contain the entry number and other

necessary information. A notation shall be placed on the Customs Form 3461 and the entry covers multiple shipments.

(d) *Low value shipments.* Shipments valued at $25 or less must be segregated from those valued at more than $25 if an advance manifest is used as the entry document.

(e) *Entry summary.* An entry summary (Customs Form 7501) must be presented in proper form, and estimated duties deposited, within 10 days of release of the merchandise under either the regular or alternative procedure described in this section.

§ 128.7 Formal entry procedures.

The district director may require a formal entry for an individual shipment or may require the consolidation of shipments under one such entry in accordance with Customs policies, procedures, and automated processing capabilities, or in accordance with the provisions of § 143.22 of this chapter. In such case, individual shipments for the same consignee valued at $1250 or less may be consolidated on one entry.

§ 128.8 Simplified entry document procedures.

(a) *Entry number.* All entry numbers must be furnished to Customs in a Customs approved bar coded readable format.

(b) *Entry documentation waiver.* The district director may, at the time of entry, waive production of entry documentation for those entries designated as not requiring examination or review if the advance manifest requirements of § 128.3(a) of this chapter have been met.

PART 143—CONSUMPTION, APPRAISEMENT, AND INFORMAL ENTRIES

1. The authority citation for Part 143 would continue to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. Section 143.21 would be amended by removing paragraph (1).
3. Part 143 would be amended by removing § 143.29

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 10, 1987.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 16, 1987 (52 FR 47729)]

19 CFR Part 101

PROPOSED CHANGES TO THE CUSTOMS FIELD ORGANIZATION—CHICAGO, IL, CLEVELAND, OH, AND FORT WAYNE, IN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by changing the boundaries of the Chicago and Cleveland Customs Districts, and by designating the newly approved Customs facility at Fort Wayne, IN, as a Customs station. This change is necessary to place the Fort Wayne facility within one Customs district. The Fort Wayne station will be within the Cleveland District and be supervised by the Indianapolis, IN, port of entry. These changes are proposed as part of Customs continuing efforts to obtain more efficient use of personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

DATE: Comments must be received on or before February 16, 1988.

ADDRESS: Comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2324, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joseph O'Gorman or John Lenihan, Office of Workforce Effectiveness and Development (202–566–9425).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Service field organization currently consists of seven geographical regions further divided into districts, with ports within each district. Customs ports of entry are locations (seaports, airports, or land border ports) where Customs officers or employees are assigned to accept entries of merchandise, collect duties, clear passengers, vehicles, vessels, and aircraft, examine baggage, and enforce the Customs, and related laws.

Similar activities take place at Customs stations. However, the significant difference between ports of entry and stations is that at stations, the Federal government is reimbursed for:

(1) The salaries and expenses of its officers or employees for services rendered in connection with the entry and clearance of vessels; and

(2) Except as otherwise provided by the Customs Regulations, the expenses (including any per diem allowed in lieu of subsistence), but not the salaries of its officers or employees, for services rendered in connection with the entry or delivery of merchandise.

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs is proposing to change the boundaries of the Chicago and Cleveland Customs Districts, and designate the newly approved Customs facility at Fort Wayne, IN, as a Customs station. The change in boundaries is necessary to ensure that all of the territory serviced by the Fort Wayne facility is entirely within one Customs district.

The area to be serviced by the Fort Wayne facility currently lies within both the Chicago and Cleveland Districts. The effect of the boundary changes would be to transfer jurisdiction over the northeast corner of Indiana from the Chicago District to the Cleveland District, and thereby put the entire Fort Wayne service area into the Cleveland District. The Cleveland District already has the two closest existing ports, Dayton, OH, and Indianapolis, IN, and the Fort Wayne facility is to be operated as a Customs station under the supervision of the port director at Indianapolis. Also, Baer Field, in Fort Wayne, is scheduled to become a designated user fee airport in November 1987.

User fee airports are those which, while not qualifying for designation as an international or landing rights airport, have been approved by the Commissioner to receive the services of Customs officers for processing aircraft entering the U.S. Inasmuch as the volume of business anticipated at these airports is insufficient to justify their designation as an international or landing rights airport, the availability of Customs services is not paid for out of the Customs appropriations from the general treasury of the U.S. Instead, the services of the Customs officers are provided on a fully reimbursable basis to be paid for by the user fee airports on behalf of the recipients of the services.

If this proposal is adopted, the list of Customs regions, districts, and ports of entry, and the list of Customs stations, as set forth in §§ 101.3(b) and 101.4(c), Customs Regulations (19 CFR 101.3(b), 101.4(c)), will be amended to reflect the change in the district boundaries and the designation of a Customs station.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b) Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations Control Branch, Room 2324, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

These changes are proposed under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by E.O. No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II) and pursuant to authority provided by Treasury Department Order No. 101–5, dated February 17, 1987 (52 FR 6282).

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this document relates to agency organization it is not subject to E.O. 12291. Accordingly, a regulatory impact analysis and the review prescribed by that E.O. are not required. For the same reason, this document is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Customs routinely makes adjustments to its field organization throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although the proposal may have a limited effect upon some small entities in the area affected, it is not expected to be significant because adjusting the field organization in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was John Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECT IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PROPOSED AMENDMENTS

It is proposed to amend §§ 101.3 and 101.4, Customs Regulations (19 CFR 101.3, 101.4), as set forth below:

1. The authority citation for Part 101 would continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1, 66, 1202 (Gen. Hdnote. 11), 1624; Reorganization Plan 1 of 1965; 3 CFR 1965 Supp.

2. It is proposed to amend the list of Customs regions, districts, and ports of entry in § 101.3(b) in the following manner:

(a) In the North Central Region under the column headed "Area", directly opposite "Chicago, Ill." the description would be revised to read as follows: "The State of Illinois lying north of latitude

39°N.; that part of the State of Indiana north of latitude 41°N. and west of longitude 86°W.; and the States of Iowa and Nebraska."

(b) In the North Central Region, under the column headed "Area", directly opposite "Cleveland, Ohio" the description would be revised to read as follows: "The States of Ohio, Kentucky; that part of the State of Indiana lying south of latitude 41°N. and east of longitude 86°W.; and the county of Erie in the State of Pennsylvania."

3. It is proposed to amend the list of Customs stations in § 101.4(c) by inserting, in appropriate alphabetical order, in the listings for "Cleveland, Ohio." under the "District" column, "Fort Wayne, Ind." in the column headed "Customs stations", and on the same line, "Indianapolis" in the column headed "Port of entry having supervision".

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 20, 1987.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 17, 1987 (52 FR 47948)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87–1330)

UNITED STATES, PLAINTIFF-APPELLEE *v.* IMPERIAL FOOD IMPORTS, DEFENDANT, AND AMERICAN MOTORISTS INSURANCE CO., DEFENDANT-APPELLANT

Harvey Barrison, Russotti & Barrison, of New York, New York, argued for appellant American Motorists Insurance Company, With him on the brief was *Mariann Sullivan*.

Michael P. Maxwell, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee United States. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

(Decided December 8, 1987)

Before MARKEY, *Chief Judge*, BENNETT, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

BISSELL, *Circuit Judge*.

This is an appeal by defendant American Motorists Insurance Company (Motorists) of a summary judgment awarded plaintiff United States of America by the United States Court of International Trade. *United States* v. *Imperial Food Imports*, 660 F. Supp. 958 (1987). We affirm.

BACKGROUND

The importation of foodstuffs is regulated by the United States Customs Service (Customs) and the Food and Drug Administration (FDA) and requires the filling of a bond before release of the shipment by Customs. When importing foodstuffs the importer or its broker must notify the FDA, which may issue a "may proceed notice." However, the FDA may determine that the merchandise should not be permitted to enter the country without proof of compliance with 21 U.S.C. § 381(a)(3) (1982), which concerns adulterated food. In such a case, the FDA will issue a Notice of Sampling, 21 C.F.R. § 1.90, and often a Notice of Detention and Hearing, 21 C.F.R. § 1.94. If the importer does not respond to the Notice of De-

tention within ten days, a Notice of Refusal of Admission is issued, 21 C.F.R. § 1.94. The importer then has ninety days to either export or destroy the foodstuffs. If the importer has not acted after ninety days, Customs issues a Notice of Redelivery, 19 C.F.R. § 141.111. If the importer fails to comply by redelivering the goods, the importer breaches its bond with Customs.

This action arises from the importation of nine shipments of foodstuffs in 1984, by Imperial Food Imports (Imperial) and its customhouse broker, Western Overseas Corporation (Western). Motorists acted as surety for the bonds provided to Customs. When Imperial imported these shipments, the FDA issued a Notice of Sampling and, subsequently, a Notice of Detention and Hearing for each. Motorists provided Western with blank bonds to be used as needed. For four of the shipments, Imperial and Western filed bonds with Customs before the issuance of the Notice of Detention. For the other five shipments, the bonds were filed after the issuance of the Notice of Detention. Imperial filed both entry notices and the bonds with Customs, which released the shipments. Imperial did not abide by the Notices of Detention or the subsequent Notices of Redelivery. According to Customs regulations, Imperial had breached the bonds and was subject to liquidated damages. Motorists was not notified of any of these Notices.

Imperial defaulted on the bonds leaving Motorists liable as its surety. Motorists did not pay the liquidated damages. One year after the final demand for payment the United States brought a civil action in the United States Court of International Trade for the damages plus interest from the date of final notice to Imperial. The United States and Motorists both moved for summary judgment, which was granted to the United States. Motorists has appealed.

Issues

1. Whether the trial court erred in granting summary judgment because a dispute existed as to a material fact.
2. Whether the trial court abused its discretion in awarding prejudgment interest.

Discussion

I

Motorists contends that it was improper to grant summary judgment because there was an issue of material fact. Motorists relies on the Restatement of Security § 124(1) (1941), which states:

> Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the

> surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

The issue of material fact that Motorists alleges to exist is whether the government had a duty to disclose, through the Customs Service, that Notices of Detention had been issued by the FDA before accepting bonds for the shipments. We reject this argument.

The parties filed stipulations of fact in this case before the grant of summary judgment. As to those facts, it is too late at this time for Motorists to argue that a dispute exists. There was one fact, however, to which the parties did not stipulate. This concerns an admission made by the government in its reply brief below, that in five of the subject shipments, Customs received the bonds after Notices of Detention were issued. Motorists maintains that granting summary judgment was inappropriate in this case in light of the questions of fact this admission may raise, and consequently, that we should reverse and remand for a full trial on the merits. Nevertheless, even if we construe this admission in a light most favorable to Motorists, it still does not justify a reversal and remand.

According to the leading case construing § 124, a surety must meet three conditions to set forth a defense that would discharge its obligation:

> Section 124, subdivision (1), of the Restatement of Security prescribes three conditions prerequisite to imposition of a duty on a creditor to disclose facts it knows about the debtor to the surety. Those conditions are: (a) "the creditor has reason to believe" that those facts materially increase the risk "beyond that which the surety intends to assume"; (b) the creditor "has reason to believe that the facts are unknown to the surety"; and (c) the creditor "has a reasonable opportunity to communicate" the facts to the surety.

Sumitomo Bank of California v. *Iwasaki,* 70 Cal.2d 81, 93, 447 P.2d 956, 965, 73 Cal. Rptr. 564, 573 (1968). Assuming *arguendo* that this circuit were to adopt this reading of the restatement, on the record before us, there is insufficient evidence to satisfy these three elements. Specifically, there is nothing in the record to suggest that the government had reason to believe Motorists did not know that the stated bonds were filed after Notices of Detention were issued. In view of the lack of evidentiary support for Motorists' position, although the government's admission may raise certain questions of fact, these questions are not sufficiently material to require reversal of the trial court's grant of summary judgment. *See Lemelson* v. *TRW, Inc.,* 760 F.2d 1254, 1260–61, 225 USPQ 697, 700–01 (Fed. Cir. 1985). *See generally Celotex Corp.* v. *Catrett,* 106 S. Ct. 2548, 2552–53 (1986).

II

Motorists also argues that the trial court erred by awarding prejudgment interest because (1) liquidated damages functioned in this

case as a penalty, and prejudgment interest may not be awarded when a recovery is punitive; and (2) the trial court abused its discretion in making this award. We also reject these arguments.

First, although prejudgment interest may not be awarded on punitive damages, *Underwater Devices, Inc.* v. *Morrison-Knudsen Co.*, 717 F.2d 1380, 1389, 219 USPQ 569, 576 (Fed. Cir. 1984) (in a patent infringement, prejudgment interest is awarded to compensate for the delay in payment and not to punish), Motorists has not established that the liquidated damages in this case were punitive. Liquidated damages are not penalties if they are reasonable and the exact amount of the damages sustained would be difficult to prove. *Fraser* v. *United States*, 261 F.2d 282, 287 (9th Cir. 1958); *Ely* v. *Wickham*, 158 F.2d 233, 234–35 (10th Cir. 1946). The liquidated damages assessed in this case were reasonable. Customs assessed $220,749.00 in liquidated damages, representing the value of the merchandise plus estimated duties, after the importer failed to destroy or export the non-admitted goods. *Imperial Food*, 660 F. Supp. at 959–60. Moreover, the exact amount of damage sustained by the importer's failure to remove foodstuffs that in most instances were adulterated by the presence of insect and rodent filth would be difficult to prove. Therefore, we conclude that the liquidated damages awarded in this case were not punitive.

Second, it is well-established that in cases such as this in which no statute specifically authorizes an award of prejudgment interest, such an award lies within the discretion of the court as part of its equitable powers. *Jennie-O Foods, Inc.* v. *United States*, 580 F.2d 400, 412 (Ct. Cl. 1978); *United States* v. *B.B.S. Electronics Int'l Inc.*, 622 F. Supp. 1089, 1095 (CIT 1985). The Court of International Trade's comments on the availability of prejudgment interest in *United States* v. *Goodman*, 572 F. Supp. 1284 (CIT 1983), are particularly applicable to the instant matter:

> In the present case, it is obvious that if prejudgment interest were not awarded to the Government, nonpayment of estimated duties would amount to an interest-free loan of the money owing the Government from the due dates for payment until recovery. Plainly, then, as a matter of equity and fairness, the United States should be compensated for the loss of use of the money due.

Id. at 1289.

As in *Goodman*, the government here lost the use of the funds constituting the liquidated damages award from the date of final demand for payment. It would be inequitable and unfair for the government to make an interest-free loan of this sum from the date of final demand to the date of judgment. Motorists makes much of the fact that the government did not bring suit until one year after the date of final demand. The trial court obviously considered this in balancing the equities because it awarded prejudgment interest from the date of final demand rather than from the earlier date of

breach. *Imperial Food*, 660 F. Supp. at 961. Therefore, we conclude that the award of prejudgment interest in this case was not an abuse of discretion.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 87–125)

EMPIRE PLOW CO. INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–11–01620

Before CARMAN, *Judge.*

[Plaintiff's motion denied and action dismissed.]

(Decided November 18, 1987)

Beveridge and Diamond, P.C., (Alexander W. Sierck, and R. Paul Beveridge, on the motion) for the plaintiff.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel, United States International Trade Commission, *(John C. Kingery,* on the motion); and *Richard K. Willard,* Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Elizabeth C. Seastrum)* for the defendant.

MEMORANDUM OPINION

CARMAN, *Judge:* Plaintiff moves, pursuant to Rule 56.1 of the Rules of this Court, for review upon the agency record of a negative determination by the United States International Trade Commission (ITC), published in *Agricultural Tillage Tools From Brazil,* 50 Fed. Reg. 43,008 (1985), *amended, Agricultural Tillage Tools From Brazil,* 51 Fed. Reg. 453 (1986). The ITC determined, pursuant to section 705(b) of the Tariff Act of 1930 (the Act), as amended, 19 U.S.C. § 1671d(b), that an industry in the United States was not materially injured or threatened with material injury by reason of subsidized imports from Brazil of *non-disc* shaped (non-round) agricultural tillage tools, provided for in item 666.00 of the Tariff Schedules of the United States (TSUS). The ITC also made an affirmative finding an industry in the United States was materially injured by reason of subsidized *disc* shaped (round) agricultural tillage tools from Brazil. This action challenges only the negative aspect of the determination.

FACTS

Plaintiff, on behalf of United States domestic producers of agricultural tillage tools, filed a petition with the ITC in September, 1984, alleging the production and/or exportation to the United States of agricultural tillage tools from Brazil were being subsidized by the government of Brazil, and the domestic industry was materially injured or threatened with material injury by reason of sales in the United States of such goods. The ITC conducted an investigation and determined, on November 12, 1984, there was a reasonable indication an industry in the United States was threatened with material injury by reason of the subject imports. On June 10, 1985, the United States International Trade Administration (Commerce) made a preliminary determination there was reason to believe certain benefits, which constituted subsidies within the meaning of section 703(b) of the Act, as amended, 19 U.S.C. § 1671b(b), were being provided to manufacturers, producers, or exporters of the subject products in Brazil. *Preliminary Affirmative Countervailing Duty Determination; Certain Agricultural Tillage Tools From Brazil,* 50 Fed. Reg. 24270 (June 10, 1985). The ITC commenced its final investigation simultaneously. *Agricultural Tillage Tools From Brazil,* 50 Fed. Reg. 28292 (July 11, 1985). On August 26, 1985, Commerce published its final affirmative countervailing duty determination stating it had determined certain benefits received by the foreign producers constituted subsidies at a rate of 8.06 percent *ad valorem. Final Affirmative Countervailing Duty Determination; Certain Agricultural Tillage Tools From Brazil,* 50 Fed. Reg. 34525 (1985). Subsequently, the majority of the ITC Commissioners, by a 4 to 1 vote, made an affirmative determination that injury to an industry in the United States did exist by reason of subsidized imports of disc shaped agricultural tillage tools, but otherwise found no material injury or threat of material injury to an industry in the United States existed by reason of imports from Brazil of non-disc shaped agricultural tillage tools.

Among the materials considered in evidence by the Commissioners were ITC staff reports which indicated the only company that *imported and produced* non-disc agricultural tillage tools was Wiese Corporation (Wiese). In one of the staff reports the ITC staff apparently indicated incorrectly that Herschel Corporation (Herschel) was an importer of non-disc agricultural tillage tools. Record at No. 18, p. A–14. Other portions of the record revealed the ITC staff reports indicated Herschel imports discs but not non-disc agricultural tillage tools from Brazil. Record at No. 20.04, pp. 9, 24; No. 21–07, pp. 4, 9, 9A. In any event, Wiese was included and Herschel was excluded by the ITC in its industry headcount.

CONTENTIONS OF PARTIES

Plaintiff contends the ITC committed reversible error by including within the headcount of the domestic industry two United States producers which, when tabulated together, sold a significant amount of non-disc tillage tools imported from Brazil. These two producers, continues plaintiff, collected significant levels of sales in the market and were significantly more profitable in the market than those domestic producers which did not additionally import the Brazilian product. Plaintiff maintains inclusion of these two producers into the category of all of the U.S. domestic producers considered by the ITC skewed the aggregate figures on industry performance and made the domestic industry appear far healthier than it would have been had the two producers been excluded. Plaintiff urges the ITC exceeded its authority by including these two domestic producers in the headcount of the rest of the domestic industry considered in establishing which industries constituted the "domestic industry" and which constituted "related parties" pursuant to 19 U.S.C. § 1677(4)(B).

Defendant contends the consideration by the ITC of Wiese as a part of the total domestic industry in the United States producing non-disc shaped agricultural tillage tools was supported by substantial evidence on the record and was not otherwise contrary to law. Defendant also argues although Herschel was incorrectly portrayed in one part of the record as an importer of non-disc type agricultural tools, it was characterized correctly at another part of the staff report as importing *disc* and not *non-disc* items. Furthermore, had the staff tabulation concerning Herschel been correctly shown, states defendant, the difference between the non-importer and importers would have been less and the data supplied to the ITC would have presumably been more favorable to plaintiff. Finally, defendant points out although plaintiff made its "related parties" argument known to the ITC at the preliminary and final investigations, with respect to another importer, it did not raise the "related parties" issue, concerning Wiese, with the ITC.[1]

THE QUESTION PRESENTED

The Court is presented with the question of whether or not the ITC's decision not to exclude the firms of Wiese & Herschel from the investigation of the domestic non-disc agricultural tillage industry, under the related parties section of the applicable statute, was unsupported by substantial evidence or otherwise not in accordance with law.

The relevant statute provides as follows:

> (B) *Related parties.*—When some producers are related to exporters or importers, or are themselves importers of allegedly subsidized or dumped merchandise, the term "industry" may be

[1] It appears from the record the plaintiffs also did not raise the "related parties" issue as to Herschel at the administrative level.

applied in appropriate circumstances by excluding such producers from those included in that industry.

19 U.S.C.A. § 1677(4)(B) (1980).

DISCUSSION

The Court, upon review of the instant determination, must sustain the determination of the ITC unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B); *American Spring Wire Corp.* v. *United States,* 8 CIT 20, 590 F. Supp. 1273 (1984), *aff'd sub nom. Armco, Inc.* v. *United States,* 760 F. 2d 249 (Fed. Cir. 1985). The administrative agency "has broad discretion in the enforcement of the trade laws and * * * [its] 'decision does not depend on the "weight" of the evidence, but rather on [its] expert judgment * * * based on the evidence of the record.' " *Manufacturas Industriales de Nogales, S.A.* v. *United States,* 11 CIT, ——, ——, Slip Op. 87–87 at 9 (July 24, 1987) (quoting *Matsushita Electric Industrial Co.* v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984)). Much deference is given to agency interpretation provided it is sufficiently reasonable; it need not be the only reasonable interpretation. *Actor Inc.* v. *United States,* 11 CIT——, ——, 658 F. Supp. 295, 299 (1987).

The meaning of "substantial evidence" has been described as follows:

> 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Substantial evidence 'is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'

Matsushita Electric Industrial Co. v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938); and quoting *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 619 (1966) respectively).

The Court may not substitute its judgment for that of the ITC, even though the Court might have made a different determination on a trial *de novo. Maine Potato Council* v. *United States,* 9 CIT 293, 613 F. Supp. 1237 (1985), *American Spring Wire Corp.,* 8 CIT 20, 590 F. Supp 1273 (1984).

The ITC majority of Commissioners, after an extensive analysis of the evidence presented, found any problems experienced by the domestic industry during the period under investigation were not occasioned by the subsidy of imports of other non-disc type tillage tools from Brazil. The ITC observed that while there was some evidence of lost sales and underselling with respect to the non-disc agricultural tillage tools from Brazil, the low and relatively stable level of the market share of these imports did not indicate they were a cause of material injury.

The Court finds the analysis of the facts by the ITC was reasonable and supported by substantial evidence on the record and was otherwise in accordance with law. The Court also finds the decision by the ITC to include only Wiese and not Herschel in the industry headcount was supported by substantial evidence on the record. Therefore, only the inclusion of Wiese in the ITC industry headcount shall be considered by the Court.

Plaintiff maintains this is a case of first impression and urges the Court decide whether or not and under what circumstances the ITC should exercise its discretion under § 1677(4)(B) to exclude producers that play two roles, i.e., as both importer and domestic producer. Plaintiff, citing *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985), contends when Congress gave the ITC authority to apply general standards in countervailing duty and antidumping investigations on a case by case basis, Congress intended the "exercise of (such) discretion be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations" *Id.* at 1032. Plaintiff maintains Congress did not give the ITC unbridled authority to apply general criteria in such a manner as to skew the analysis of the economic data. Although the ITC has recognized this principle in other cases, plaintiff urges it implicity failed to follow that principle in this case. Plaintiff believes the ITC consideration of two producers that played distinct roles, i.e., that of domestic producer and importer in what plaintiff characterizes as the "universe of domestic producers", skewed the economic results.

Defendant, on the other hand, points out while the ITC did not explicitly discuss the related parties issue in its determination, the plaintiff, at the administrative level, never raised the issue with the ITC. Citing various case authority, defendant points out the courts have repeatedly held: "the Commission is not required to issue findings and conclusions on an issue concerning a statutory element simply because it was presented by the petitioner." Defendant's Memorandum in Response to Plaintiff's Motion for Judgment upon the Agency Record at 9, *Empire Plow Co.* v. *United States,* Court No. 85–11–01620. Furthermore, defendant suggests plaintiff is in a weaker position to complain when it did not raise the issue at the administrative level. Lastly, in defense of its position, defendant maintains the following: "absent a showing to the contrary, the Commission is presumed to have considered all the evidence in the record." *Jeannette Sheet Glass Corp.* v. *United States,* 9 CIT 155, 162, 607 F. Supp. 123, 130 (1985), *appeal dismissed,* 803 F.2d 1576 (Fed. Cir. 1986), *vacated in part,* 11 CIT ——, 654 F. Supp. 179 (1987).

It is clear from the language of § 1677(4)(B) the "related parties" provision *may be* applied to a domestic producer if the domestic producer is related to a foreign producer or imports the merchandise in question. *Gilmore Steel Corp.* v. *United States,* 7 CIT 219, 226, 585 F.

Supp. 670, 677 (1984). It is clearly within the ITC's discretion to apply the related parties provision in its analysis of the facts of the case. What remains unclear is the reasonableness of the agency's discretion in deciding under what circumstances to apply the provision.

There appears to be little legislative history to explain the "related parties" provision in § 1677(4)(B). The Legislative History of the Trade Agreements Act of 1979, nevertheless, provides as follows:

> Thus, for example, where a U.S. producer is related to a foreign exporter and the foreign exporter directs his exports to the United States so as not to compete with his related U.S. producer, this should be a case where the ITC would not consider the related U.S. producer to be a part of the domestic industry.

S. Rep. No. 249, 96th Cong., 1st Sess. 83, *reprinted in* 1979 U.S. Code Cong. & Admin. News 469.

This illustration applies to the first scenario where a domestic producer is related to the foreign producer. Such is not the present situation involving Wiese. But the legislative history does provide some analogous guidance with respect to the ITC's discretionary powers.

The above legislative report displays an intent to exclude from the industry headcount domestic producers which, due to a relationship with the foreign producer, benefit from the foreign exporter "direct[ing] his exports to the United States so as not to compete with [the] related U.S. producer * * *." S. Rep. No. 249 at 83. *See also Rock Salt From Canada,* Inv. No. 731–TA–239, USITC Publication No. 1798, at 11 (January 1986) ("An appropriate circumstance for applying the related parties provision is one in which the foreign producer directs his exports to the United States in such a manner so as not to compete with his related U.S. producer.") Drawing the analogy closer to the subject at hand, recent ITC determinations have set forth an important consideration warranting the application of the "related parties" provision rests in determining whether the domestic producer substantially benefits from the relation to the subject imports. If there is a substantial benefit gained from such relationship, the producers are properly excluded as related producers. *Id.* at 10.

While it appears the Court of International Trade has not previously decided when related parties should be excluded under § 1677(4)(B), the ITC has commented frequently on the related party exclusion issue. The ITC has typically approached this issue with a two-step analysis: (1) whether or not the domestic producers are themselves importers of the subject product or are related to the importers or foreign producers of such product through a corporate relationship; and (2) whether or not there are appropriate circumstances for excluding those domestic producers from the domestic industry industry for the injury analysis. *Rock Salt From Canada,* USITC Publication No. 1798. *See Certain Table Wine From France*

and Italy, Inv. Nos. 701–TA–210, 211 (Preliminary) and 731–TA–167, 168 (Preliminary), USITC Publication No. 1502 at 10 (March 1984). The ITC has also used a three-step analysis methodology: (1) whether or not the company qualifies as a "domestic producer"; (2) whether or not the firm is "related" within the meaning of section 771(4)(B); and (3) whether or not, in view of that relationship, there are appropriate circumstances for excluding the company from the definition of the domestic industry. *Color Television Receivers From the Republic of Korea and Taiwan,* Inv. Nos. 731–TA–134, 135 (Final), USITC Pub. No. 1514 (April 1984).

Once the ITC has determined the related producer status under the first and/or second steps in the analysis, the ITC apparently exercises its discretion in determining whether or not the "appropriate circumstances" exist for excluding the related parties from the domestic industry. In such situations, the ITC has declared: "Domestic producers who substantially benefit from their relation to the subject imports are properly excluded as related producers." *Rock Salt From Canada,* USITC Publication No. 1798, at 10. Benefits accrued from the relationship appear to be a major factor considered by the ITC. *See id.* at 11 ("Among the factors considered by the Commission in previous investigations are: * * * (2) the reasons the domestic producers have chosen to import the product under investigation, that is *to benefit* from the unfair trade practice or in order to enable it to continue production and compete in the domestic market * * *.") This is a reasonable approach when viewed in light of the legislative history discussed above.

The ITC is also concerned about excluding companies which account for a significant share of the domestic production and which exclusion would result in impairing the accuracy of the ITC determination, *Id.* at 13; *Certain Table Wine From France and Italy,* Publication No. 1502, at 11, 12; *Color Television Receivers From the Republic of Korea and Taiwan,* Publication No. 1514. at 9; and including companies which inclusion would skew the economic data. *Certain Table Wine From France and Italy,* Publication No. 1502, at 11.

Although all of the above considerations have been published by the ITC in other past determinations implementing the "related parties" provision, these considerations were not published in the instant determination presumably because the "related parties" issue was not raised at the administrative level before the ITC concerning Wiese or Herschel. Plaintiff, while not raising its argument at the administrative level, now appears to complain the ITC has not set forth reasons for including the two producers with the other domestic producers. The Court finds this complaint is without merit. The ITC need not discuss every issue raised in its determination even though it has been raised at the administrative level. *Jeanette Sheet Glass,* 9 CIT at 162, 607 F. Supp. at 130. This rule would seem to have greater impact where the issue was not even raised at the

administrative level. Where the issue has not been raised at the administrative level, as in the present circumstances, a litigant must not be allowed to circumvent the requirement of exhausting its administrative remedies by raising the issue in its civil action. *Hercules, Inc.* v. *United States.* 11 CIT ——, Slip Op. 87–114 at 45 (October 20, 1987). A party challenging the ITC determination must contest those factual findings at the administrative level in order to raise them again before this Court, exceptions notwithstanding. Plaintiff, here, attempts to argue a factual error exists in the inclusion of Weise in the headcount when this argument was not raised in the administrative hearings below. Accordingly, this Court must dismiss this claim. Furthermore, the Court finds the determination of the ITC is reasonable based upon the evidence presented in the record.

The Court holds plaintiff has failed to demonstrate the determination of the ITC was unsupported by substantial evidence on the record or otherwise contrary to law. Plaintiff's motion is denied; the final determination of the ITC in *Agricultural Tillage Tools From Brazil* is affirmed; and this action is dismissed. Judgment will be entered accordingly.

SO ORDERED.

(Slip Op. 87–126)

BMT COMMODITY CORP. AND DELCA DISTRIBUTORS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANTS, AND CODFISH CORP., DEFENDANT-INTERVENOR

Court No. 85–7–00915

[Plaintiffs' motion for rehearing denied.]

(Dated November 19, 1987)

Freeman, Wasserman & Schneider (Jack G. Wasserman) and *Jerry P. Wiskin)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel and *Judith M. Czako,* United States International Trade Commission, for defendants.

Patton, Boggs & Blow (Bart S. Fisher, Michael D. Esch, and *Daniel E. Waltz)* for defendant-intervenor.

OPINION

Plaintiffs, BMT Commodity Corp. and Delca Distributors, Inc., pursuant to Rule 59 of the Rules of this court, move for a rehearing of this court's opinion and judgment in this action. *BMT Commodity Corp.* v. *United States,* 11 CIT ——, 667 F. Supp. 880 (1987). That opinion and judgment denied plaintiffs' motion for judgment based upon the administrative record challenging the International Trade Commission's (Commission) final affirmative dumping determina-

tion in *Certain Dried Salted Codfish from Canada,* USITC Pub. No. 1711, Inv. No. 731–TA–199 (July 1985) (ITC Determination).

In their motion for rehearing, plaintiffs argue that: (1) the court misconstrued the opinions of the Commission regarding "viability at inception" and "viability in the future," and (2) the court misinterpreted or overlooked evidence of record. For the following reasons, plaintiffs' motion for rehearing is denied in all respects.

A motion for rehearing is addressed to the sound discretion of the court. *United States* v. *Gold Mountain Coffee, Ltd., et al.,* 8 CIT 336, 601 F. Supp. 212 (1984). The exceptional circumstances for granting a rehearing were clearly enunciated in *W.J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358, C.R.D. 72–5 (1972) as follows:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

68 Cust Ct. at 358 (footnote omitted).

The purpose of a rehearing is not to retry a case. *Brookside Veneers, Ltd.* v. *United States,* 11 CIT ——, 661 F. Supp. 620 (1987), *appeal docketed,* No. 87–1379 (Fed. Cir. June 4, 1987).

With regard to their first argument, plaintiffs assert specifically that the court wrongly inferred that the Commission majority explored Codfish Corporation's viability at inception. In addition, plaintiffs allege that the court incorrectly concluded that Codfish Corporation filed a petition under the bankruptcy laws in late 1984 and that this error "colors the relevant time frames which all parties (and the Court) recognize as critical and bears directly on the sufficiency of the evidence relied on by the Commission's majority." Plaintiffs' Memorandum at 4–5.

These grounds possess none of the criteria upon which a rehearing may be granted. Plaintiffs argued at length in their motion for judgment on the administrative record that the Commission failed to focus its material retardation analysis on Codfish Corporation's "viability at inception." They are not now entitled to a rehearing simply because the court rejected those arguments. This court has consistently denied motions for rehearing premised solely on the moving party's dissatisfaction with the trial court's decision. *E.g., V.G. Nahrgang Co.* v. *United States,* 6 CIT 210 (1983); *Industrial Fasteners Group* v. *United States,* 3 CIT 104 (1982); *Gold Mountain Coffee,* 8 CIT 336, 601 F. Supp. 212.

There appears to be some confusion between the date of bankruptcy and the date operations of Codfish Corporation first ceased. In fact, the bankruptcy petition appears not to have been filed until

November, 1985, several months after the Commission's final determination of July, 1985 and approximately a year after Codfish Corporation first discontinued its operations. Any error as to the date of official filing is not, however, a "significant flaw" which gives rise to the right for rehearing. In fact, such an error would in no way affect the substance of the court's decision. Because this court concluded, and plaintiffs agree, that the appropriate focus of analysis of viability of the domestic industry in this material retardation case was at its inception, the precise date at which the bankruptcy petition was filed is inconsequential. Furthermore, to the extent the court discussed viability other than based on analysis of initial feasibility, it was concerned with plans for future operations, not change in legal status under the bankruptcy laws.

Plaintiffs' second argument in support of their motion is that the court misinterpreted or overlooked evidence of record. Specifically, they claim that the court erroneously concluded that plaintiffs did not contest the raw data contained in Codfish Corporation's initial feasibility study; and that the court misconstrued the record in determining that there was substantial evidence to establish that Codfish Corporation had sufficient working capital and that the market for dried salted codfish was not declining.

Plaintiffs assert now, as they did in their original brief, that the two documents on which the Commission relied, the initial feasibility study prepared on behalf of Codfish Corporation and the breakeven analysis prepared by the Commission staff, are "a mass of obviously incomplete data, demonstrably faulty assumptions and half-baked accounting techniques." Plaintiffs' Memorandum at 12. In support of this general condemnation, plaintiffs claim that transportation costs utilized in the initial feasibility study were flawed and that the study's reliance on the procurement of raw materials from traditional source countries was misplaced. Plaintiffs' Memorandum at 13.

In making its determination, the Commission concluded that any disadvantages Codfish Corporation may have had vis-a-vis Canadian producers in the areas of transportation costs or in procuring raw materials were offset by advantages gained in reduced labor costs and easy access to local markets. ITC Determination at 7. The court found this conclusion to be supported by substantial evidence in the record. 667 F. Supp. at 885–86.

Plaintiffs' present assertion that "the raw data in the initial feasibility study regarding Codfish Corporation's transportation costs was specifically attacked and unquestionably demonstrated to be seriously flawed" is simply incorrect. Plaintiffs' Memorandum at 13. The only attack on transportation costs by plaintiffs prior to the motion for rehearing was leveled at raw data contained in Codfish Corporation's May, 1985 study, not the initial feasibility study, and relates to the cost of transporting raw material from "new sources." Plaintiffs' Main Brief supporting their Rule 56.1 motion at 30. The

accuracy of this data, which is relevant only to the issue of Codfish Corporation's viability after it was already affected by LTFV imports, affords plaintiffs no basis for a rehearing. Likewise, plaintiffs' preference for conclusions contained in the Citicorp study regarding the cost effectiveness of Codfish Corporation procuring raw materials from traditional source countries over those contained in the initial feasibility study affords plaintiffs no basis for a rehearing. Plaintiffs, once again, are simply repeating arguments previously made in this case which have been rejected by the court.

Plaintiffs state two objections to the court's treatment of the working capital issue: first, the court should not have faulted plaintiffs for failing to present specific evidence regarding Codfish Corporation's capital needs because the Commission denied plaintiffs' request for disclosure of Codfish Corporation's initial feasibility study; and second, the court's conclusion that Codfish Corporation's working capital was adequate was based on unsubstantiated statements of counsel which demonstrates an absence in the record of substantial evidence which would support this factual determination by the court. Plaintiffs' Memorandum at 14–17.

While access to Codfish Corporation's feasibility study might have helped plaintiffs prepare their argument, given the availability of other sources of relevant information, including the opportunity to question Codfish Corporation's president Paulo de Cunha at the May 20, 1985 ITC hearing, the court is not convinced that the Commission's refusal to disclose the feasibility study irreparably hindered plaintiffs' presentation. In any case, disputes regarding access to information at the administrative level should be resolved during the administrative proceeding. Substantial evidence exists in the record to support the Commission's determination and the determination will not be overturned merely because, under other circumstances, plaintiffs might have presented more evidence.

Plaintiffs argue that the court's opinion on working capital cites only statements of counsel in support of this conclusion and not actual evidence in the record. Although counsel's statements are cited, this does not signify that evidence of record does not exist. The court had before it the entire record compiled before the Commission, including the initial feasibility study, when it evaluated plaintiffs' arguments and the Commission's determination. *E.g.,* ITC Staff Report at A–31 to A–38; Codfish Corporation's Initial Market Feasibility Study, *reprinted in* ITC Staff Report A–101, A–109 (Appendix C). Based upon this evaluation of the record, the court found that substantial evidence existed to support the conclusion that Codfish Corporation did not lack working capital with which to purchase inventory. If plaintiffs wish to take issue with this evaluation, they may not do so now before this court. "An allegedly incorrect evaluation of evidence by a trial court is not a proper ground for rehearing but for appeal." *Eiseman-Ludmar Co.* v. *United States,* 2 CIT 109 (1981). Although this matter did not come before

the court for *de novo* hearing, the proposition remains true here as well.

Plaintiffs' final argument, that substantial evidence does not exist to support the conclusion that the demand for cod was not declining, must also be dismissed. Plaintiffs cite a statement by the Puerto Rico Chamber of Commerce that demand in Puerto Rico for dried salted fish had declined. In support of the contrary conclusion, the Commission relied upon data that the sales volume of cod was stable at relatively high price levels. Plaintiffs contend that this data is inaccurate and beyond the scope of investigation because the date was not compiled at the time of Codfish Corporation's inception. First, this argument takes issue with the court's evaluation of evidence and provides plaintiffs with no basis for a rehearing. Second, this argument is not compelling. The pricing data relied upon by the Commission appears in the appendix to the determination. The fact that the data was compiled in 1985 should not obviate its probative value. In verifying the relevance of portions of the Citicorp Study, the court recognized that following the progress of an industry could reveal important information about initial viability, (provided LTFV effects were taken into consideration). Consumer demand is clearly a factor that may be better understood by observing fluctuations over time. Thus, there does not seem to be any inconsistency in the court's analysis.

In summary, plaintiffs have advanced no argument that the court did not consider in its original decision and have presented no acceptable grounds for granting a rehearing.

According, plaintiffs' motion for a rehearing, pursuant to Rule 59, is denied and the original decision must be adhered to.

(Slip Op. 87–127)

CHINA NATIONAL METALS & MINERALS IMPORT & EXPORT CORP., CHINA NATIONAL MACHINERY & EQUIPMENT IMPORT & EXPORT CORP., CHINA NATIONAL MACHINERY IMPORT & EXPORT CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 86-06-00719

Before TSOUCALAS, *Judge.*

[Plaintiffs' motion for judgment on the agency record denied; action dismissed.]

(Decided November 24, 1987)

Graham & James (Lawrence R. Walders, Denis H. Oyakawa, and *Jeffrey L. Snyder),* for plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Elizabeth C.*

Seastrum) for defendant; Of counsel: *Mary Patricia Michel,* Attorney-Advisor, U.S. Department of Commerce.

Memorandum Opinion and Order

Tsoucalas, *Judge:* This action challenges the decision by the Department of Commerce, International Trade Administration (Commerce) in *Certain Iron Construction Castings from the People's Republic of China; Final Determination of Sales at Less Than Fair Value.* 51 Fed. Reg. 9483 (March 19, 1986). Plaintiffs contend that it was error for Commerce to determine foreign market value (FMV) based on prices from a basket of countries which were not economically comparable to the PRC, alleging that price information from a comparable surrogate country was available. The action is before the Court on plaintiffs' motion for judgment upon the administrative record.

Background

Plaintiffs are manufacturers and exporters of iron construction castings from the People's Republic of China (PRC), and were subject to the antidumping investigation, which resulted in the final determination of sales at less than fair value (LTFV). 51 Fed. Reg. 9483. To determine FMW in the PRC, which, for purposes of the investigation, is a state-controlled, non-market economy (NME), Commerce was required to find an appropriate surrogate country, from which prices or constructed value could be derived. 19 U.S.C. § 1677b(c); 19 C.F.R. § 353.8. In its preliminary determination, Commerce used the prices in India, as estimated in the petition, for determining FMV in the PRC. 50 Fed. Reg. 43594 (October 28, 1985). For its final determination, Commerce identified eight potential non-state controlled countries which could serve as a surrogate country: Egypt, India, Indonesia, Morocco, Pakistan, Philippines, Sri Lanka, and Thailand. However, when requested to complete the questionnaires supplied by Commerce each country refused to cooperate except Indonesia, whose responses were inadequate. Commerce thus used the average f.o.b. import values of iron construction castings from all countries exporting this merchandise to the United States, which were not subject to antidumping or countervailing duty orders or investigations, and which did not exhibit price aberrations. This yielded Italy, Japan, Switzerland, Taiwan, and the United Kingdom.

Plaintiffs challenge this selection, as the least preferable method, claiming it was error for Commerce not to use prices from a surrogate country of comparable economic development, as required by the regulations. Plaintiffs contend that India is comparable to the PRC in economic development, whereas the market basket is comprised of countries at a far more advanced stage of economic development. Plaintiffs proffer three sources from which price information from India was available: (1) home market price information

from the concurrent investigation on iron construction castings in India; (2) U.S. sales price of Indian imports based on Customs' invoices; or (3) average unit values of this product imported from India as reflected in U.S. import statistics (IM 146–data).

However, Commerce concluded that use of the first two sources would constitute a breach of its duty to not disclose confidential information submitted in a concurrent investigation; and because of these confidentiality restrictions, adjustments necessary to the third alternative could not be made, thus this method would not fall within the hierarchy set forth in 19 C.F.R. § 353.8.

The issue is whether Commerce's conclusion is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence:

> 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' * * * [It] 'is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'

Matsushita Elec. Indus. Co., Ltd. v. *United States,* 750 F2d. 927, 933 (Fed. Cir. 1984). (Citations omitted).

DISCUSSION

The regulations set out in 19 C.F.R. § 353.8, promulgated pursuant to 19 U.S.C. § 1677b(c) (1982), establish a hierarchy of methods for determining the FMV of a product from a NME. By identifying a surrogate country, which has a non-state-controlled-economy, the basis for FMV shall be either: (1) the prices for which this merchandise sold, either in that home market, or in third countries; or (2) the constructed value of this merchandise in that surrogate country. Although there is a preference for using prices over constructed value, to the extent possible, this surrogate country should be at a level of economic development comparable to the one under investigation. 19 C.F.R. § 353.8(b)(1). Further, if no comparable surrogate can be identified, then the basis for FMV shall be another non-state-controlled-economy country or countries, suitably adjusted for known differences in the cost of materials and labor. 19 C.F.R. § 353.8(b)(2).

Commerce, having ascertained that there was no comparable surrogate country, employed the "market basket" approach in 19 C.F.R. § 353.8(b)(2). However, concurrent with its investigation into iron construction castings from the PRC, Commerce was also investigating sales of this merchandise from India. *See Certain Iron Construction Castings from India; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 9486 (March 19, 1986). As a result, plaintiffs allege that Commerce was in possession of adequate home market prices for iron construction castings in India, which should

have been used to calculate FMV in the PRC, thus satisfying the first tier in the surrogate selection hierarchy.

Commerce rejected this alternative, relying on 19 U.S.C. § 1677f(b)(1) (1982 and Supp. II 1984), which mandates that proprietary information shall not be disclosed without the consent of the person submitting it, except: to the officer or employee directly involved in conducting the investigation for which it was submitted; or under protective order; or as provided for in subsection (a)(4)(A). This latter subsection permits disclosure of proprietary information received in the course of a proceeding, if it can be disclosed in a form which cannot be associated with, or otherwise be used to identify, the operations of a particular person. Accordingly, Commerce cited its established policy, not to use confidential information gathered in a concurrent investigation involving the same merchandise, without the consent of the submitting party. Commerce determined that such consent had been withheld on behalf of the Indian producers in that unrelated investigation.

The Court first addresses plaintiffs' contention that the record does not support Commerce's conclusion that India objected to use of its data. The record does not contain a separate request by Commerce to the producers in India for permission to use the information submitted in the concurrent investigation. Nevertheless, Commerce contacted the government in India initially to seek surrogate country data for purposes of this investigation as well as for an unrelated investigation into steel wire nails from the PRC. The response from the Indian government makes reference to the dual request but explains that "it would not be possible for Indian firms to be used as surrogates in the Chinese industry, in connection with the anti-dumping investigation on steel wire nails." In support of that position, the letter cites the non-comparable costs of production as reflected in: differences in industrial base, infrastructural facilities, and relative factor endowments; as well as different political and economic management, and different priorities in industrial development. R. Doc. 30.

Concededly, the letter does not explicitly indicate the Indian government's objection to the use of its data in this PRC investigation. Nonetheless, it does not seem that consent may be implied based on the record evidence. In the first instance, the reasons offered by the Indian government in declining to be used as a surrogate are not factually specific to the steel wire nail investigation but refer to general distinctions between the countries. It is relevant at this juncture to note that in the majority of investigations involving the PRC, India has failed to respond to requests for information for the purpose of surrogate country comparison.[1] It is of further import

[1] *Porcelain-on-Steel Cooking Ware from the PRC; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 36419 (October 10, 1986); *Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the PRC; Final Determination of Sales at Less than Fair Value,* 51 Fed. Reg. 25078 (July 10, 1986); *Steel Wire Nails from the PRC; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 10247 (March 25, 1986); *Final Determination of Sales at Not Less Than Fair Value; Barium Carbonate from the PRC,* 49 Fed. Reg. 33913 (August 27, 1984); *Final Determination of Sales at Less Than*

Continued

that Commerce reported in its final investigation that the firms in India failed to respond to questionnaires when contacted for surrogate country data in this investigation. 51 Fed. Reg. 9484.

Finally, when plaintiffs herein, as respondents in the investigation below, sought access to the data in the Indian investigation, the Indian producers objected to that disclosure under protective order. R. Doc. 26. It is apparent that India has expressed its intent to not be used as a surrogate for the PRC. In determining whether the Court should sustain Commerce's conclusion that it did not have the consent of the Indian government to use its information, the question is whether the administrative conclusion is rational. *Timken Co.* v. *United States,* 11 CIT ——, ——, Slip. Op. 87–118 at 7 (October 29, 1987), (citing *Matsushita Electrical Industrial Co.* v. *United States,* 750 F. 2d 927, 933 (Fed. Cir. 1984)). It is the factual determinations and the application of legal principles by the agency, which the court must review to ascertain whether those findings of fact and conclusions of law are supported by substantial evidence and in accordance with law. *Industrial Fasteners Group, American Importers Ass'n* v. *United States,* 2 CIT 181, 190, 525 F. Supp. 885, 892 (1981), *aff'd* 710 F.2d 1576 (Fed. Cir. 1983). The Court determines that there is substantial evidence in the record to support the conclusion that India did object to the use of the information.

The second issue is presented by plaintiffs' assertion that consent from the Indian producers is not necessary because Commerce has incorrectly equated disclosure of the information submitted in confidence with use of that information. It is suggested that Commerce could use the weighted average FMV of the four Indian producers involved in that investigation, thereby avoiding disclosure of the operations of any one producer, and thus satisfy the parameters of § 1677f(a)(4)(A).

Commerce has determined that in the absence of consent by the submitting party it cannot use data from a concurrent investigation of the same merchandise without compromising the confidential nature of the information. The interpretation of a statute given by the agency authorized to administer it is to be accorded great deference. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978) (Citations omitted). If sufficiently reasonable to be accepted by the Court, the agency's construction need not be the only reasonable conclusion, or the conclusion that the Court would reach. *Id.*

Defendant claims that use of the weighted average FMV from the Indian investigation would preclude verification of the figures as required by 19 U.S.C. § 1677e(a) (1982 and Supp. II 1984):

> The administering authority shall verify all information relied upon in making * * * a final determination in an investigation, * * * [and] shall report the methods and procedures used to verify such information. If * * * unable to verify the accuracy of

Fair Value: Potassium Permanganate From the PRC, 48 Fed. Reg. 57347 (December 29, 1983). *Compare Final Determination of Sales at Less Than Fair Value: Chloropicrin From the PRC,* 49 Fed. Reg. 5982 (February 16, 1984), where the product in question was not manufactured in India, data from that country was used to construct a value for the PRC.

> the information submitted, it shall use the best information available * * *.

It is argued that the case analyst in the Indian investigation would have had to have "blinded" the information in such a way so that the PRC analyst could have used it without violating the confidentiality statute. Further, there were certain adjustments in the Indian investigation which could not have been disclosed. The Court notes that when a party to the investigation, such as plaintiffs herein, would seek to challenge the reliability of the figures used by Commerce in its calculation, Commerce would be seriously constrained in its ability to substantiate the confidential price information of surrogate country producers in India.[2]

Additionally, foreign exporters would have no incentive to comply with future requests for proprietary information, if not assured that protection of such data would not be compromised. Plaintiffs' methodology would seem to circumvent all efforts made by India, the non-party, to prevent use of its information in an unrelated investigation. In consideration of the aforementioned concerns, for Commerce to conclude that it has an obligation not to use confidential information unless and until consent is obtained from the submitting party, is reasonable and not plainly inconsistent with the meaning of 19 U.S.C. § 1677f. *ICC Industries, Inc.* v. *United States,* 812 F.2d 694, 699 (Fed. Cir. 1987).

Plaintiffs further assert that if it was not feasible to use home market data from India, then it would be proper to use Indian sales prices to the United States available from Customs invoices. The Court recognizes that Commerce has almost uniformly refused to use price information from a surrogate whose products are under investigation in an antidumping or countervailing duty case. *Porcelain-On-Steel-Cooking Ware from PRC; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 36419 (October 10, 1986); *Shop Towels of Cotton from the PRC; Final Results of Administrative Review,* 50 Fed. Reg. 26020 (June 24, 1985); *Carbon Steel Wire Rod from Poland: Final Determination of Sales at Less than Fair Value,* 49 Fed. Reg. 29434 (July 20, 1984). Evidently, the main consideration is the unreliability of the price information due to the unknown dumping margin if any.

However, plaintiffs point to a deviation in this practice in *Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the PRC; Final Determination of Sales at Less Than Fair Value,* where Commerce used the price of imports from Argentina adjusted for the export subsidy found in the recently completed investigation in that country. That situation is distinguishable as Commerce stated that: Argentina offered a far superior product mix over other coun-

[2] The importance of verifying the information relied upon is underscored by the Congressional dictate that Commerce must use the best information available if unable to verify the information submitted, or if any person refuses to produce requested data. The enactment of this provision in the Trade Agreements Act of 1979, was to remedy past practices, where verification was not required by law. S. Rep. No. 96-249, 96th Cong. 1st Sess., 98 (1979). The purpose of this section would seemingly be thwarted if Commerce merely represents that the figures were verified without disclosing its methods.

tries; other countries were subject to VRAs which could tend to distort the price; and the export subsidy was calculated to be less than one percent. 51 Fed. Reg. 25078 (July 10, 1986).

The petitioners therein also argued that India's prices should be used as comparable surrogate data. However, due to the fact that Indian companies were the subject of a recently completed investigation of the same product, Commerce was compelled to use another alternative, as it was led to understand that cooperation would not be forthcoming. 51 Fed. Reg. at 25080. Commerce has thus been forced to utilize less preferable alternatives when a comparable surrogate refuses to cooperate, and the selection, as to which method it will employ, is dependant upon the critical factors in each investigation.

Although plaintiffs concede that the prices could be adjusted by the dumping margin calculated in the Indian investigation, those results were not issued until the same day as were the final results in this investigation. Thus, plaintiffs would consider it proper, in determining FMV in the PRC, for Commerce to adjust export prices from India by a figure calculated in that concurrent investigation before that figure was even publicly available. In this vein, Commerce maintains that problems with confidentiality, paralleling those previously outlined, precluded use of this alternative.

As defendant reasons, although the figures used to calculate the dumping margin in the Indian investigation were verified, and while the verification methodology could be revealed, the data from which this margin was derived could not be disclosed as it was subject to confidentiality restrictions. For purposes of this investigation, the parties, in effect, would be unable to verify the accuracy of the FMV comparison.

Thus, it appears that in order to avoid conflicts between the verification and confidentiality requirements, Commerce found this not to be a viable alternative. It has been acknowledged that in order to effectively administer the antidumping laws, Commerce enjoys some "methodological flexibility." *Ceramica Regiomontana, S.A.* v. *United States,* 10 CIT ——, —— 636 F. Supp. 961, 966 (1986). The wisdom of these methods withstands scrutiny, if there is support in the record as a whole for the agency's determination and if these methods are in accordance with law. *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT 520, 524, 622 F. Supp. 1071, 1075 (1985). It cannot be said that the agency's procedures are not supported by the record or not in accordance with law.

Finally, plaintiffs challenge Commerce's refusal to use publicly available average import values from IM–146 statistics adjusted for the dumping margin found. This source contains import quantity and value figures compiled from Customs data by the Census Bureau. Plaintiffs claim that the ITA has in the past resorted to export prices as reflected in either Customs invoices or IM–146 statistics, when home market prices from a surrogate are not available.

Commerce referred to the logic applied in *Shop Towels of Cotton from the PRC; Final Results of Administrative Review,* which held that adjusting a surrogate country's export price by the amount of net subsidy would not yield a FMV that fell within the hierarchy (19 C.F.R. § 353.8) nor would it be a preferred basis for calculating fair market value;[3] it "would be merely a constructed hypothetical value." 50 Fed. Reg. at 26023.

As defendant submits, the IM–146 data represents a cumulative figure of the total imports from the four producers in India with unknown proportions, it does not equal the actual prices which are really utilized in the dumping investigation. Therefore, the adjustment based on actual prices would bear no relationship to the value derived from the import statistics. Commerce has accurately cited in support of this position 19 U.S.C. § 1677b(c) and 19 U.S.C. § 353.8(a), which provide that in determining foreign market value for a NME, the preference is to use actual prices or costs.

Based on the record, the Court cannot conclude that it was an abuse of discretion or not in accordance with law for Commerce to use the market basket approach for lack of reliable data which would satisfy the first tier in the hierarchy. "Failure to use a discretionary alternative method does not constitute error when the agency uses a lawful second method." *Carlisle Tire & Rubber Co.,* 9 CIT at 525, 622 F. Supp. at 1076. In these circumstances, there is no policy or practice in effect which prevents Commerce from exercising its discretion under the law to use preferred price data, even if from non-comparable countries. *Chemical Products Corp.* v. *United States,* 10 CIT ——, ——, 645 F. Supp. 289, 294 (1986). *See Porcelain-On-Steel Cookware from the PRC, supra,* (producers from comparable surrogates were not willing to cooperate, therefore, FMV was based on average price of imports from market basket); and *Natural Bristle Paint Brushes and Brush Heads from the PRC; Final Determination of Sales at Les than Fair Value,* 50 Fed. Reg. 52813 (Dec. 26, 1985) (no other production of certain brushes; FMV for that merchandise calculated on weighted average price of all imports to the U.S.).

The purpose of the state controlled-economy statute "is to arrive at the best estimate of foreign market value in the country of export." *Chemical Products Corp.,* 10 CIT at ——, 645 F. Supp. 293. As part of its inherent power to make the dumping determination, Commerce may use all reasonable ways and means authorized by law to achieve that end. *Zenith Radio Corp.* v. *United States,* 9 CIT 110, 113, 606 F. Supp. 695, 699 (1985), *aff'd,* 783 F.2d 184 (Fed. Cir. 1986). While the ideal choice of surrogates, based solely on economic comparability, may be India, the reasons set forth by Commerce in rejecting that source are in accordance with law. The Court must sustain the surrogate selection, as the means employed by Com-

[3] Although in that situation Commerce was placed in a best information available situation due to the respondents' refusal to cooperate, and was not bound by the hierarchy of preferable methods, Commerce outlined its analysis given the premise that it did have an obligation to follow the hierarchy. 50 Fed. Reg. at 26022.

merce are directed at effecting the entire statutory purpose. *Ceramica Regiomontana,* 10 CIT at ——, 636 F. Supp. at 966.

CONCLUSION

The Court considers there to be substantial evidence in the record to support Commerce's conclusion that the government of India did not consent to the use of price information from India from a concurrent unrelated investigation. Further, Commerce has reasoned that its ability to use information from India, such as a weighted average figure from the concurrent investigation, or from Customs invoices, or from IM–146 import statistics, is limited by: the restrictions on the use of confidential information, the requirements of using information that is verifiable, and the preferred methods set out in the regulations. This conclusion is in accordance with law, and procedure used by Commerce in calculating FMV does fall within the authorized methods. Plaintiffs' motion for judgment on the agency record must, therefore, be denied and the action dismissed. SO ORDERED.

(Slip Op. 87–128)

SERAMPORE INDUSTRIES PVT. LTD., AND THE ENGINEERING EXPORT PROMOTION COUNCIL OF INDIA, PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, DEFENDANT, ALHAMBRA FOUNDRY CO., ET AL., DEFENDANT-INTERVENORS

Court No. 86–06–00743

Before DICARLO, *Judge.*

Determinations by United States Department of Commerce, International Trade Administration (Commerce) in antidumping duty investigation not to make adjustments to United States price for deposits of estimated countervailing duties and to treat sales to the United States market made at or above the prices charged in the exporter's home market as having a zero percent dumping margin are in accordance with law. The case is remanded to Commerce for certain recalculations and an explanation of its methodology in calculating the "all other" weighted average dumping margin.

[Action affirmed in part and remanded in part.]

(Decided November 25, 1987)

Kaplan, Russin & Vecchi, (Dennis James, Jr.) for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Department of Justice, Commercial Litigation Branch *(A. David Lafer)* for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal and *Carol Mitchell)* for defendant-intervenors.

DICARLO, *Judge:* Serampore Industries Private Ltd. and the Engineering Export Promotion Council of India (plaintiffs) challenge the final determination of the International Trade Administration of

the United States Department of Commerce (Commerce) that certain iron construction castings from India are being or are likely to be sold in the United States at less than fair value (LTFV). *Certain Iron Construction Castings From India; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 9486 (Mar. 19, 1986). This Court has jurisdiction over the action pursuant to 19 U.S.C. § 1516a(2) (Supp. III 1985) and 28 U.S.C. § 1581(d) (1982). Plaintiffs move under Rule 56.1 of the Rules of this Court for judgment on the agency record and ask the Court to remand to Commerce for certain recalculations. Commerce concedes it erred in making some of the challenged calculations and asks the Court to remand. The Court affirms in part and remands in part.

BACKGROUND

The Municipal Castings Fair Trade Council, a trade association which represents domestic producers of iron construction castings, and fifteen named members of the association filed a petition with Commerce alleging that iron construction castings from India were being sold in the United States at LTFV. *Certain Iron Construction Castings From India; Initiation of Antidumping Duty Investigation,* 50 Fed. Reg. 24,014 (June 7, 1985).

Commerce presented questionnaires to Serampore and three other Indian companies under investigation. Serampore claimed an adjustment for indirect taxes paid on items physically incorporated into the final products but refunded upon export by means of a cash compensatory support lump sum payment. Serampore also claimed an adjustment for drawback upon export of excise duty paid on the raw materials used to produce the finished castings. Serampore further claimed an upward adjustment of its United States price (USP) for the deposit of estimated countervailing duties on heavy iron castings entered during the period of investigation.

In its preliminary determination of LTFV sales, Commerce made upward adjustments to Serampore's USP for the cash compensatory support payment, the excise duty drawback, and the deposits of estimated countervailing duties. *Iron Construction Castings From India; Preliminary Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 43,595 (Oct. 28, 1985).

Commerce verified Serampore's initial and supplemental questionnaire responses and found that Serampore received a 5% cash compensatory support payment for refund of indirect taxes upon export of heavy castings and a 10% cash compensatory support payment for certain light castings. Commerce also verified that Serampore received a drawback of excise duty on iron castings exported to the United States. Commerce determined that the prices Serampore paid for pig iron included excise duty, octroi (border tax) and sales taxes. Citing Serampore's recordkeeping, Commerce did not isolate taxes on paint and packing materials.

In its final determination of sales at LTFV, Commerce found the following weighted-average dumping margins:

Manufacturers/sellers/exporters	Weighted-average margin percentage
RSI (excluded)	0
Kejriwal (de minimis) (excluded)	0.39
Serampore	0.90
Kajaria (de minimis) (excluded)	0.03
All others	0.90

51 Fed. Reg. at 9490.

In calculating Serampore's dumping margin, Commerce did not add the cash compensatory support payment to USP. Commerce deducted from foreign market value some of the indirect taxes refunded upon export, but made no adjustments for refunds of the central sales tax. Commerce also added duty drawback to Serampore's USP, although Commerce had verified that the drawback was of excise duty and not import duty.

Although Commerce had added deposits of estimated countervailing duties to Serampore's USP in its preliminary determination, Commerce did not add deposits of estimated countervailing duties to USP in its final determination.

With respect to Serampore's weighted average dumping margin, Commerce refused to use Serampore's sales at fair value to offset its sales at LTFV.

With respect to the weighted average margin for "all other" companies, Commerce disregarded margins of the other companies investigated that were found not to be dumping or dumping only at de minimis rates, and applied the margin found for Serampore alone to the "all other" rate.

Commerce has moved to strike two paragraphs of plaintiffs' reply brief and an affidavit of plaintiffs' counsel attached to that brief. The Court reserves ruling on the motion because the subject challenged in plaintiffs' reply brief is remanded.

Discussion

In reviewing final Commerce determinations in antidumping duty investigations, the Court is directed by Congress to hold unlawful those determinations found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Under the substantial evidence standard for review of agency determinations, the Court will affirm the agency's findings if they are supported in the record by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists,* 106 S. Ct. 2009, 2014 (1986); *Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1562 (1984). The

Court "must accord substantial weight to an agency's interpretation of a statute it administers." *American Lamb Co.* v. *United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986) (citing *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450–51 (1978); *Udall* v. *Tallman,* 380 U.S. 1, 85 (1964)). However, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.,* 106 S. Ct. 681, 686 (1986).

1. *Excise Duty Drawback*

Plaintiffs claim that Commerce erred in adding excise duty drawback to Serampore's USP. In its final determination, Commerce declared that it was adding "duty drawback" to USP pursuant to 19 U.S.C. § 1677a(d)(1)(B) (1982), which provides for an upward adjustment to USP for customs duties that are rebated or uncollected by reason of exportation. Subsequent to the determination and upon review of plaintiffs' arguments and the administrative record, the defendant concluded that: (1) the excise duty on pig iron is a tax and not an import customs duty; (2) the excise duty drawback was in fact deducted from Serampore's foreign market value and inadvertently added to its USP, thereby negating the adjustment made to Serampore's foreign market value; and (3) as a rebate of indirect taxes, the excise duty drawback should only have been deducted from Serampore's constructed value calculations pursuant to 19 U.S.C. § 1677b(e)(1)(A) (1982), not added to the USP. Commerce thus concedes that the addition of excise duty drawback to Serampore's USP was incorrect. This part of the action is remanded.

2. *Central Sales Tax*

Plaintiffs claim that Commerce erred with respect to indirect taxes by excluding from Serampore's constructed value less than the full amount of indirect taxes refunded by way of cash compensatory support. Commerce verified that the prices Serampore paid for pig iron included excise duty, octroi, and sales taxes. Although Commerce made adjustments for refunds of excise duty, octroi, and West Bengal State sales tax, Commerce made no adjustments for the Indian central sales tax.

Defendant asserted at oral argument that Commerce did not err in failing to account for the central sales tax. The Court ordered further briefing on the central sales tax issue.

In response to the Court's order, defendant moved pursuant to Rule 1 of the Rules of this Court for a remand in order to allow it to ascertain whether the iron construction castings Serampore produced incurred the central sales tax. If the answer is affirmative, Commerce will determine the amount of this indirect tax Serampore incurred during the period of investigation and make all appropriate adjustments. This part of the action is remanded.

3. *Estimated Countervailing Duties*

Plaintiffs claim that Commerce's final determination should have included an upward adjustment to USP for deposits of estimated countervailing duties paid on iron castings entered during the period of investigation. The antidumping statute and regulations mandate an upward adjustment to USP by the amount of any countervailing duty "imposed" on the merchandise to offset an export subsidy. 19 U.S.C. § 1677a(d)(1)(D) (1982); 19 C.F.R. § 353.10(d)(1)(iv) (1985). In 1984 Commerce instructed the United States Customs Service to collect a cash deposit of estimate duties of 2.19% of the entered value of future imports of iron castings from India. *Certain Iron-Metal Castings From India; Final Results of Administrative Review of Countervailing Duty Order,* 49 Fed. Reg. 40,943 (Oct. 18, 1984). This order to collect estimated countervailing duties was in effect during Commerce's period of investigation, which covered sales of iron construction castings made to the United States from December 1, 1984 through May 31, 1985. In Commerce's preliminary determination, it increased USP for deposits of the estimated countervailing duties:

> In accordance with section 772(d)(1)(D) of the Act, [19 U.S.C. § 1677a], where appropriate, we added the amount of countervailing duty *imposed* in India on certain heavy iron metal castings to offset export subsidies.

50 Fed. Reg. at 43,596 (emphasis added).

In its final determination, however, Commerce did not adjust USP to account for the deposits of estimated countervailing duties, stating that 19 U.S.C. § 1677a(d)(1)(D) does not specifically prescribe an adjustment to USP "until the countervailing duty is actually *assessed* on the subject merchandise * * *." 51 Fed. Reg. at 9487.

The starting point for interpreting a statute is the language of the statute itself, which must ordinarily be regarded as conclusive absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Comm'n* v. *GTE Sylvania,* 447 U.S. 102, 108 (1980); *Southeastern Community College* v. *Davis,* 442 U.S. 397, 405 (1979); *Gilmore Steel Corp.* v. *United States,* 11 CIT ——, Slip Op. 87–112 at 9 (Oct. 6, 1987). Going behind a statute's plain language to search for a possibly contrary congressional intent is a step the court must take cautiously, even under the best circumstances. *United States* v. *Locke,* 471 U.S. 84, 95–96 (1985).

The statute provides for USP to be increased by

> the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy.

19 U.S.C. § 1677a(d)(1)(D) (1982). The language of the statute does not disclose the scope of the meaning Congress intended to accord the word "imposed."

Commerce interprets the word "imposed" as used in 19 U.S.C. § 1677a(d)(1)(D) and 19 C.F.R. § 353.10(d)(1)(iv) to include countervailing duties only when they are "actually imposed" or "assessed." Commerce and the defendant-intervenors state that this interpretation, which excludes deposits of estimated countervailing duties, is of consistent and longstanding practice. *See, e.g., Antidumping; Circular Welded Carbon Steel Pipes and Tubes From Thailand; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 3384, 3387 (Jan. 27, 1986); *Low-Fuming Brazing Copper Rod and Wire From New Zealand; Final Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 42580, 42581 (Oct. 21, 1985); *Oil Country Tubular Goods From Spain; Final Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 12599, 12601 (Mar. 29, 1985).

Commerce and the defendant-intervenors cite to legislative history of the Trade Agreements Act of 1979, which repealed the Antidumping Act of 1921 and reenacted its provisions as part of the Tariff Act of 1930. In the relevant portion of the Senate Finance Committee Report that accompanied the Trade Agreements Act of 1979, the Committee used the word "assessed" rather than "imposed" when referring to the adjustments for USP:

> The purpose of the amendment regarding additions to purchase price and exporter's sale price with respect to countervailing duties also *being assessed* because of an export subsidy is designed to clarify that such adjustment is made only to the extent that the exported merchandise, and not the other production of the foreign manufacturer * * *, benefits from a particularl [sic] subsidy.

S. Rep. No. 249, 96th Cong. 1st Sess. 94, *reprinted in* 1979 U.S. Code Cong. & Ad. News 480 (emphasis added). The provision is further explained in the relevant portion of the Statements of Administrative Action:

> A new adjustment to "purchase price" and "exporter's sales price" is intended to reflect provisions of Article VI of the General Agreement on Tariffs and Trade, by mandating the addition to "purchase price" or "exporter's sales price" of any countervailing duty *actually imposed* to offset an export subsidy paid on the same merchandise. (statute) The GATT prohibits the *assessment* of both antidumping and countervailing duties to compensate for the same cause of unfairly low priced imports, whether by dumping or as a result of an export subsidy.

H.R. Doc. No. 153, 96th Cong., 1st Sess. 412, *reprinted in* 1979 U.S. Code Cong. & Ad. News 683 (emphasis added). Nowhere in the legislative history of this provision is there any indication that Congress intended that Commerce adjustment USP upwards for countervailing duty cash deposits, rather than countervailing duties actually imposed or assessed.

Plaintiffs argue that the word "imposed" has been used loosely in other contexts, and cite *Lewyt Corp.* v. *Commissioner of Internal*

Revenue, 349 U.S. 237, 240 (1955); *Zenith Electronics Corp.* v. *United States,* 10 CIT ——, —— n.14, 633 F. Supp. 1382, 1388 n.14 (1986); *American Manufacturers of Castor Oil Products* v. *United States,* 8 CIT 255, 258 (1984); *Diversified Products Corp.* v. *United States,* 6 CIT 155, 163, 572 F. Supp. 883, 890 (1983).

Plaintiffs citation of cases using the word "imposed" in other contexts does not compel a conclusion that Commerce's interpretation of the word "imposed" as used in 19 U.S.C. § 1677a(d)(1)(D) and 19 C.F.R. § 353.10(d)(1)(iv) is either unreasonable or unlawful.

If, as in this case, an agency's interpretation of a statute does not contravene "clearly discernible legislative intent," the Court must uphold such interpretation as long as it is "sufficiently reasonable." *Kelley* v. *Secretary, United States Dep't of Labor,* 812 F.2d 1378, 1380 (Fed. Cir. 1987); *American Lamb Co.* v. *United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986).

This issue concerns adjustments to USP for deposits of estimated countervailing duties in an antidumping duty determination. This Court has recently considered adjustments to USP for deposits of estimated antidumping duties in an antidumping duty determination. *PQ Corp.* v. *United States,* 11 CIT ——, 652 F. Supp. 724 (1987), presented the issue of whether Commerce erred in not deducting the deposit of antidumping duties from USP, where the exporter's subsidiary paid the deposit without passing it onto the United States buyer, and where no antidumping duty was ever actually assessed. The court noted that estimated deposits may be refunded if they later prove unnecessary:

> Under the Tariff Act of 1930, deposits of estimated antidumping duties must be posted for merchandise that is subject to an antidumping duty order. The amounts of these deposits are based upon past determinations of dumping margins involving previous entries. The amount of the actual antidumping duty that is eventually assessed on an entry of merchandise may vary significantly from the amount of estimated antidumping duties initially deposited on that entry. The difference between the deposit of estimated antidumping duties, and the actual assessed antidumping duties is either collected, or refunded with interest.

PQ Corp., 11 CIT at ——, 652 F. Supp. at 737. The court held that it was reasonable for Commerce not to make any adjustments under 19 C.F.R. § 353.55 or 19 U.S.C. § 1677a(d)(2)(A) for deposits of estimated antidumping duties.

As with the estimated and assessed antidumping duties discussed in *PQ Corp.,* the law likewise distinguishes between the collection of cash deposits for estimated countervailing duties, 19 U.S.C. § 1671e(a)(4) (Supp. III 1985); 19 C.F.R. § 355.28(d)(2) (1985), and the subsequent assessment of countervailing duties, 19 U.S.C. § 1671e(a)(1) (1982); 19 C.F.R. §§ 355.36(a), 355.37 (1985).

Commerce's interpretation of the word "imposed" to mean "actually imposed" or "assessed" is supported by the legislative history and is sufficiently reasonable. Commerce thus properly refused to adjust USP for the deposits of estimated duties.

4. *Serampore's Weighted Average Margin*

While Serampore sold some merchandise at LTFV, it also sold some merchandise at or above its foreign market value. Commerce disregarded Serampore's fair value sales and considered only the sales at LTFV to determine Serampore's weighted average dumping margin. Plaintiffs contend that Commerce's practice improperly creates sales at LTFV where none would otherwise exist, because Serampore's fair value sales would "offset" its sales at LTFV.

The antidumping law provides in part that if Commerce

> determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value * * * then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

19 U.S.C. § 1673 (1982).

A plain reading of the statute discloses no provision for Commerce to offset sales made at LTFV with sales made at fair value.

The Court grants substantial deference to Commerce in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law. *See Consumer Products Div., SCM Corp.* v. *Silver Reed America, Inc.*, 3 Fed. Cir. (T) 83, 90, 753 F.2d 1033, 1039–40 (1985).

Commerce may treat sales to the United States market made at or above the prices charged in the exporter's home market as having a zero percent dumping margin. The practice of considering negative margins as zero "ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 9089, 9092 (Mar. 17, 1986). *See also Final Determination of Sales At Not Less Than Fair Value; Potassium Chloride From Israel,* 50 Fed. Reg. 4560, 4562 (Jan. 31, 1985) (95 percent of U.S. sales found to be at or above foreign market value; Commerce nonetheless found no reason to average fair value sales with the remaining percentage of sales at LTFV); Knoll, *United States Antidumping Law: The Case for Reconsideration,* 22 Tex. Int'l L.J. 265, 278 (1987); Sandler, *Primer on United States Trade Remedies,* 19 Int'l L. 761, 765 (1985).

Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law.

5. *The "All Other" Weighted Average Margin*

In its preliminary determination, Commerce calculated the rate for those companies which were not asked to respond to antidumping questionnaires by weight averaging the preliminary margins found for the four companies that were investigated. Margins were found for all four companies investigated and the weighted average "all other" rate was set at 3.10%. 50 Fed. Reg. at 43,596.

In the final determination, three of the four companies investigated were found to have zero or de minimis margins. 51 Fed. Reg. 9490. To calculate the "all other" rate for the final determination, Commerce disregarded the three companies with de minimis margins and based the "all other" rate on Serampore's rate alone.

Plaintiffs argue that Commerce's methodology is inconsistent, because in at least one other determination, *Certain Welded Carbon Steel Pipe and Tube Products From Turkey; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 13044 (Apr. 17, 1986), Commerce did not ignore de minimis margins in setting the "all other" rate. Plaintiffs argue further that the practice of excluding de minimis margins in calculating the "all other" weighted average margin violates the GATT Antidumping Code, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, 4356, T.I.A.S. No. 6431.

The Court does not reach the plaintiffs' GATT arguments because the defendant has neither distinguished nor explained *Certain Welded Carbon Steel Pipe and Tube Products From Turkey,* where Commerce included de minimis margins in calculating the "all other" rate. The Court is thus without an explanation from the concerned agency as to the reasoning behind its apparently inconsistent methodologies.

Defendant-Intervenors attempted to explain *Certain Welded Carbon Steel Pipe and Tube Products From Turkey,* as an example that Commerce "generally" will not consider company specific margins based on the use of best information available in calculating a weighted-average margin for "all others." Defendant-Intervenors' Memorandum at 30. However, as the court noted in *Badger-Powhatan* v. *United States,* 10 CIT ——, 633 F. Supp. 1364, 1371–72, *appeal dismissed for lack of jurisdiction,* 808 F.2d 823 (Fed. Cir. 1986), "[a]lthough intervenor's explanation is intriguing, there is no statement from the concerned agency that this is its reasoning."

Intervenors also observe that in earlier antidumping determinations Commerce set the "all other" rates at the highest dumping margin found for any firm investigated. *See, e.g., Preliminary Determination of Sales at Less Than Fair Value; Certain Steel Pipes and Tubes From Japan,* 47 Fed. Reg. 37263, 37266 (Aug. 24, 1982); *Preliminary Determination of Sales at Less Than Fair Value; Certain Steel Products From the Federal Republic of Germany,* 47 Fed. Reg. 35650, 35656 (Aug. 16, 1982); *Preliminary Determinations of Sales at Less Than Fair Value; Certain Steel Products From France,* 47 Fed.

Reg. 35656, 35660 (Aug. 16, 1982). Intervenors opine that the practice of disregarding all margins lower than the highest deposit rate "apparently has been abandoned." Defendant-Intervenor's Memorandum at 30 n.8. Commerce has also failed to explain its shift from this earlier practice.

"[I]f there is an agency practice to be given weight in this case, the court is simply at a loss as to what that practice is." *Badger-Powhatan*, 10 CIT at ——, 633 F. Supp. at 1372. Neither has Commerce promulgated any rule in accordance with the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). *See Carlisle Tire & Rubber Co.* v. *United States*, 10 CIT ——, 634 F. Supp. 419 (1986). The Court is unable to sustain an apparently inconsistent methodology used to calculate the "all other" rate. Commerce is ordered, as part of the remand proceedings, to explain the basis for its apparently inconsistent methodology.

CONCLUSION

This action is remanded to Commerce to make its determination within 120 days. The plaintiffs will thereafter have 10 days in which to file a brief on the remand results with the Court. Defendant-intervenors and Commerce will thereafter have 10 days after receipt of the plaintiffs' brief in which to file a reply.

SO ORDERED.

(Slip Op. 87–129)

CHANNEL MASTER, DIV. OF AVNET, INC., PLAINTIFF
v. UNITED STATES, DEFENDANT

Court No. 80–5–00802

Before RE, *Chief Judge.*

ON PLAINTIFF'S MOTION FOR REHEARING

Plaintiff, pursuant to Rule 59(a) of the Rules of the United States Court of International Trade, moves for a rehearing of *Channel Master, Div. of Avnet, Inc.* v. *United States*, 10 CIT ——, 648 F. Supp. 10 (1986).

Held: Since plaintiff has not satisfied the requirements for the granting of a rehearing, plaintiff's motion is denied.

[Motion denied.]

(Dated November 25, 1987)

Fitch, King & Caffentzis (Richard C. King on the motion), for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, International Trade Field Office *(Saul Davis* on the motion), for defendant.

RE, *Chief Judge:* Pursuant to Rule 59(a) of the rules of this court, plaintiff has moved for a rehearing of the judgment in *Channel*

Master, Div. of Avnet, Inc., v. *United States*, 10 CIT ——, 648 F. Supp. 10 (1986).

In *Channel Master*, plaintiff challenged the classification by the Customs Service of certain merchandise imported from Japan, and described on the customs invoice as "scanners." The merchandise was classified as "other solid-state (tubeless) radio receivers," under items 685.23 or 685.24 of the Tariff Schedules of the United States (TSUS), depending upon the date of importation. Consequently, the merchandise was assessed with duty at a rate of 10.4 per centum ad valorem.

After an examination of the merchandise, due deliberation of the pleadings, supporting papers, judicial precedents, and applicable authorities, the court held that the imported scanners were substantially complete radio receivers, and, therefore, had been properly classified as "other solid-state (tubeless) radio receivers," under items 685.23 or 685.24, TSUS.

By the present motion, plaintiff seeks to have the court vacate and set aside its judgment, and decide the case "on facts actually stipulated by the parties, rather than on new 'facts' added by defendant, without plaintiff's concurrence." Specifically, plaintiff contends that "[i]n this case the decision has been based upon a brief containing * * * factual allegations not contained in the stipulation * * *."

After a thorough consideration of the plaintiff's motion the court holds that the plaintiff has not satisfied the requirements for the granting of a rehearing. Since plaintiff has failed to demonstrate any grounds that would justify the granting of its motion, plaintiff's motion for rehearing is denied.

It is well established that the decision to grant or deny a motion for a rehearing lies within the sound discretion of the court. *See, e.g., ILWU Local 142* v. *Donovan*, 10 CIT ——, Slip Op. 86–28 (Mar. 13, 1986); *Oak Laminates* v. *United States*, 8 CIT 300, 601 F. Supp. 1031 (1984), *aff'd*, 783 F.2d 195 (Fed. Cir. 1986). In addition, Rule 59(a) of the rules of this court provides that a rehearing may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the court of the United States * * *." USCIT R. 59(a).

In *W.J. Byrnes & Co.* v. *United States*, 68 Cust. Ct. 358, C.R.D. 72–5 (1972), the appropriate grounds for the granting of a rehearing were set out as follows:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of the trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of

> rectifying a significant flaw in the conduct of the original proceeding.

Id. at 358.

In support of its contention that the decision in this case should be vacated and reheard, plaintiff cites *Brookside Veneers, Ltd.* v. *United States,* 9 CIT 596 (1985). In *Brookside Veneers,* the plaintiff submitted to the court a brief which appended as exhibits, materials which had not been stipulated by the parties. The court granted defendants motion to strike plaintiff's brief, and directed plaintiff to file a new brief which did not contain materials that contradicted or supplemented the stipulated facts. In its decision, the court noted that the parties were bound by the stipulations of the parties, and, therefore, materials which contradicted the stipulated facts had "been improperly presented to the Court." 9 CIT at 597. The court also stated the basic principle that, when stipulated facts and exhibits constitute the entire trial record, "evidence outside the stipulation is not properly before the Court." *Id.* Accordingly, in reaching its decision, the court refused to consider evidence improperly offered or submitted. *Id.* (citing *R.C. Williams & Co., Inc.* v. *United States,* 10 CCPA 210, 217–18, C.A.D. 19 (1938)).

The court addressed a related or similar issue in *Jimlar Corp.* v. *United States,* 10 CIT ——, Slip Op. 86–106 (Oct. 21, 1986). In the *Jimlar* case, defendant, the United States, moved for an order to strike plaintiff's post-trial brief alleging that it contained "references to four affidavits which were not introduced into evidence at the trial." Slip Op. 86–106, at 2. As to one of the affidavits, the court agreed and held that references to that particular affidavit in plaintiff's brief were improper. Nevertheless, since the references to the affidavit in no way prejudiced or misled the court, the court denied the motion to strike. In discussing improper submissions or references in the brief, the court stated that it would simply "disregard whatever references may be improper." *Id.* at 7.

The *Brookside Veneers* and *Jimlar* cases indicate clearly that, in reaching a decision, evidence may not be considered which is not properly before the court. It is important to note, however, that both of those cases dealt with motions to strike a brief before the court had reached a decision. In this case, plaintiff did not move to strike defendant's brief until after the decision was issued. Although not improper, it would seem clear that plaintiff's request is, in effect, an effort to have the court reconsider its prior holding in the *Channel Master* case.

In essence, plaintiff contends that the court should not have considered certain assertions made by defendant, because they may have misled the court. The court is fully cognizant of the basic principle that factual assertions made by counsel must be based solely on the facts in evidence, or the court must disregard them. *See Tropi-Cal* v. *United States,* 63 Cust. Ct. 518, 521, C.D. 3945 (1969). Cases need hardly be cited for the proposition that counsel "* * * is

not a witness." *See* 6 *Wigmore, Evidence* § 1806 (3d ed. 1940). Furthermore, it is fundamental in customs classification cases that " 'in order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported.' " *United States* v. *Citroen,* 223 U.S. 407, 414–415 (1912) (quoting *Worthington* v. *Robbins,* 139 U.S. 337, 341 (1891)). In making a determination as to the proper classification of imported merchandise, the court must look to the merchandise and the evidence introduced. Unless this evidence supports counsel's assertions of fact, upon which a contention or claim is based, "such statements of counsel would not justify a favorable finding of fact." *See Tropi-Cal* v. *United States,* 63 Cust. Ct. 518, 521, C.D. 3945 (1969).

Plaintiff asserts that the defendant states in its brief that by placing batteries in the imported articles and turning up the volume, "the consumer would obtain the full audible range of radio frequencies the scanning receivers were capable of receiving." Plaintiff contends that there is "nothing in the stipulation to support [this] contention." In addition, plaintiff contends that the defendant also disregards the stipulation when it argues that "[t]he radio crystal is merely essential to filter out the undesirable radio frequencies designed to be received by the scanning receiver." Plaintiff asserts that the stipulation states that the crystals select the desired frequency. In its decision the court noted that selection, detection, and amplification, are the basic functions of radio receivers. *Channel Master,* Slip Op. 86–111, at 6. Therefore, plaintiff asserts that defendant has misrepresented the facts which show that it is the missing crystals that perform the required selection function.

According to plaintiff the omitted crystals "constitute the essence of the selection and detection functions" of the imported articles, and, therefore, the alleged misrepresentations by defendant as to the function of the crystals "should not be countenanced by this Court." Plaintiff emphasizes that the crystal is essential to the functioning of the scanners, and that an article which is missing an essential component cannot be "substantially complete."

The *Channel Master* opinion reveals that the court neither considered, nor relied upon, any allegedly improper material in the defendant's brief. In its decision, the court clearly stated that "[i]n the present case, the parties have stipulated that the scanners, as imported, do not 'have the ability' to perform selection or detection." *Channel Master,* Slip Op. 86–111, at 8. In addition, the court stated that "[t]he parties also stipulated that, after the crystals are inserted, the scanners can operate to receive radio broadcasts." *Id.* at 8–9. Hence, the court concluded that "once the appropriate crystals are inserted, the scanners can perform these three basic functions of selection, amplification, and detection." *Id.* at 9.

In *Channel Master,* as the court noted, an article may be classified under item 685.24, TSUS, whether it is finished or unfinished.

Id. at 9 (citing *General Electric Co.* v. *United States,* 2 CIT 84, 90, 525 F.Supp. 1244, 1248 (1981), *aff'd,* 69 CCPA 166, 681 F.2d 785 (1982)). In determining that the imported articles were properly classified as unfinished radio receivers under Rule 10(h), the court applied the criteria set forth in *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States,* 66 CCPA 96, 600 F.2d 799 (1979). *Id.* at 3. In *Daisy-Heddon,* the court held that in determining whether an article is unfinished under Rule 10(h) the test is whether the article is "substantially complete," not whether it lacks an "essential" part. 66 CCPA 96, 102.

The court, in *Channel Master,* found the scanners to be substantially complete because "although the crystals are necessary to permit the scanner to operate, the crystal is merely one of numerous other components, all of which enable the scanners to perform the basic functions of a radio receiver." Slip Op. 86–111, at 15. Plaintiff urged the court to adopt the "essential part" test, claiming that the crystals "are the 'heart' of the radio, and that without them the scanners cannot properly be classified as radio receivers." *Id.* at 15. The court, however, ruled against plaintiff on this point and stated that in *Daisy-Heddon,* the court of appeals expressly rejected the "essential part" test. *See id.* at 11.

In *Channel Master,* the court expressly stated that "[i]t is undisputed that the crystals are necessary to the use of the scanner as a radio receiver." *Id.* at 15. The court, however, went on to state that this "does not prevent the scanners from being unfinished receivers pursuant to Rule 10(h) and the *Daisy-Heddon* criteria." *Id.* It is clear that, notwithstanding the contentions of plaintiff, the court applied the relevant case law to the stipulated facts, and concluded that the absence of the crystals did not preclude the imported scanners from being "substantially complete radio receivers." *Id.* at 13. Hence, the court held that the scanners in their condition as imported were properly classified as "other solid-state (tubeless) radio receivers," under item 685.23 or 685.24, TSUS. *Id.* at 17.

After careful consideration of the arguments of the parties, the court holds that plaintiff's contentions have been duly considered and decided in the case of *Channel Master, Div. of Avnet, Inc.,* v. *United States,* 10 CIT ——, 648 F. Supp. 10 (1986). Plaintiff has not demonstrated any grounds that would justify the granting of its motion for rehearing. Hence, its motion for rehearing is denied.

(Slip Op. 87–130)

SAUDI IRON AND STEEL CO. (HADEED), PLAINTIFF *v.* UNITED STATES, DEFENDANT, GEORGETOWN STEEL CORP., ET AL., DEFENDANT-INTERVENORS

GEORGETOWN STEEL CORP., ET AL., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, SAUDI IRON AND STEEL CO. (HADEED), DEFENDANT-INTERVENOR

Consolidated Court No. 86–03–00283

Before DICARLO, *Judge.*

Plaintiffs challenge findings that the United States Department of Commerce, International Trade Administration (Commerce) made in a final affirmative countervailing duty determination and countervailing duty order on carbon steel wire rod from Saudi Arabia. All but one of the contested findings are sustained. The action is remanded for Commerce to explain on the record how the Saudi Basic Industries Corporation's transfer of the Jeddah Steel Rolling Company to the Saudi Iron and Steel Company (Hadeed) bestowed a benefit "directly or indirectly on the manufacture, production, or export" of carbon steel wire rod by Hadeed within the meaning of 19 U.S.C. § 1677(5)(B) (1982).

[Commerce's final affirmative countervailing duty determination is sustained in part and remanded in part.]

(Decided November 27, 1987)

Miller & Chevalier, Chartered (Homer E. Moyer, Jr., Joanne Thomas Asbill and *Christopher C. Gould),* for Saudi Iron and Steel Company.

Fried, Frank, Harris Shriver, & Jacobson (David E. Birenbaum and *Alan Kashdan)* for Atlantic Steel Co.

Wiley, Rein & Fielding (Charles Owen Verrill, Jr. and *Robert C. Weissler)* for Georgetown Steel Corp., North Star Steel Texas, Inc., and Raritan River Steel Co.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Elizabeth C. Seastrum);* United States Department of Commerce *(Mary White)* for defendant.

DICARLO, *Judge:* Georgetown Steel Corporation, North Star Steel Texas, Inc., Raritan River Steel Company and Atlantic Steel Company (domestic producers) and Saudi Iron and Steel Company (Hadeed) filed actions under section 516A(a) of the Tariff Act of 1930 (Act), as amended, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (B)(i) (Supp. III 1985), to contest the final affirmative countervailing duty determination and order issued by the United States Department of Commerce, International Trade Administration (Commerce) which found that carbon steel wire rod from Saudi Arabia receives countervailable bounties or grants within the meaning of section 303 of the Act, as amended, 19 U.S.C. § 1303 (1982). *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Steel Wire Rod From Saudi Arabia,* 51 Fed. Reg. 4206 (Feb. 3, 1986). The actions were consolidated. Jurisdiction is provided under 28 U.S.C. §§ 1581(c) and 2631(c) (1982). Commerce's determination is sustained in part and remanded in part.

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record. They raise four questions: (1) whether the Saudi government provides loans from the Public In-

vestment Fund (PIF) to a specific group of enterprises within the meaning of 19 U.S.C. § 1677(5)(B) (1982); (2) whether Commerce used a reasonable methodology to determine the countervailable benefit of a PIF loan to Hadeed; (3) whether Commerce correctly characterized Hadeed's lease/purchase of a bulk material handling system as the provision of "goods or services at preferential rates" within the meaning of 19 U.S.C. § 1677(5)(B)(ii) rather than as the "provision of * * * loans * * * on terms inconsistent with commercial considerations" under 19 U.S.C. § 1677(5)(B)(i); and (4) whether a transfer of the Jeddah Steel Rolling Company to Hadeed constitutes a "provision of capital * * * on terms inconsistent with commercial considerations" within the meaning of section 1677(5)(B)(i).

In reviewing final Commerce determinations in countervailing duty investigations, the Court is directed by Congress to hold unlawful those determinations found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Under the substantial evidence standard for review of agency determinations, the Court will uphold an agency's findings if they are supported in the record by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists,* 106 S. Ct. 2009, 2014 (1986); *Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1562 (1984). The Court "must accord substantial weight to an agency's interpretation of a statute it administers." *American Lamb Co.* v. *United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986) (citing *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450–51 (1978); *Udall* v. *Tallman,* 380 U.S. 1, 85 (1964)). However, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.,* 106 S. Ct. 681, 686 (1986).

1. *Whether the Saudi government provides loans from the Public Investment Fund to a specific group of enterprises.*

Commerce found that "Saudi commercial banks are limited in their ability and willingness to make long-term loans," in part because Islamic law prohibits collection of interest. 51 Fed. Reg. at 4208. Commerce found that "[s]ince interest obligations on loans cannot be enforced in Saudi courts, and because the Saudi government limits the amount of funds which Saudi commercial banks can loan to any one individual or legal entity, Saudi commercial banks cannot lend large amounts of funds over a long period of time for large scale industrial construction projects." *Id.* Commerce concluded that the only sources of long-term financing in Saudi Arabia are the PIF, the Saudi Industrial Development Fund (SIDF), and three other specialized credit institutions, but that "only the PIF and SIDF provide funding to industrial or manufacturing projects."

Id. The Saudi government provides PIF loans "to commercially productive projects in which the Saudi government has some equity participation." *Id.*

Hadeed, the only producer in Saudi Arabia exporting carbon steel wire rod to the United States during the review period January 1 to December 31, 1984, received a PIF loan comprising 60% of its total capitalization as part of its initial investment package to construct a direct reduction plant, steelmaking plant, and rolling mill. *Id.* Hadeed is partly owned by the Saudi Basic Industries Corporation (SABIC). R. 598, 614. SABIC, in turn, was wholly-owned by the Saudi government from 1976 through early 1984 when it issued new stock and became 70% government owned and 30% privately owned. R. 83, 2042.

To determine whether the Saudi government provides PIF loans to "a specific enterprise or industry or group of enterprises or industries" within the meaning of section 1677(5)(B), Commerce reviewed all PIF lending, beginning with the first loans made in 1973. Commerce found that "despite the number of products which have received PIF financing, these loans are given predominantly to finance *projects undertaken by PETROMIN, Saudia Airlines, and SABID,"* and that "[s]ince 1978, PIF loans have gone exclusively to these *three companies' projects."* 51 Fed. Reg. at 4208 (emphasis added). Commerce determined, therefore, that the Saudi government provides PIF loans to a "specific group of enterprises" within the meaning of the section.

Hadeed contends Commerce's determination is "premised on an erroneous factual assumption * * * that PIF loans have been made to only three companies." Brief in Support of Hadeed's Motion for Judgment on the Agency Record, at 14, 21. Hadeed claims that 24 different companies received PIF loans and that 24 companies are not a "specific group of enterprises" within the meaning of the section.

The record discloses that all PIF loans were not made directly to Saudia Airlines, SABIC or PETROMIN as the name recipients. Conf. R. 1936–38. In the final determination, Commerce determined that PIF loans were provided to finance "*projects undertaken by three specific enterprises.* While the [Public Investment] Fund may be open to investment in any project in which there is some public ownership, the loans, in fact, have been *provided only to three companies."* 51 Fed. Reg. at 4215. (emphasis added). Commerce thus determined that the Saudi government provides PIF loans "to projects undertaken by a specific group of enterprises, PETROMIN, Saudia Airlines and SABIC," 51 Fed. Reg. at 4213, based on its finding that these three companies directly or through their projects received all PIF loans since 1978 and most loans since 1973.

Hadeed asserts that the operations of separate companies named as PIF loan recipients are not "projects" of Saudi Airlines, PETROMIN, and SABIC. Hadeed claims the other operations were

found to be projects of these three companies merely because the three companies are equityholders in the companies named as PIF loan recipients for the different operations and argues that this test based on commonality of shareholders has never been used to define a specific group of enterprises.

The record reveals Saudia Airlines is the named recipient of the PIF loans for the "projects" in which it is involved, and the record reveals that SABIC and PETROMIN, when not the 100% owner had a 50% or more interest in the company named as the recipient for the PIF loan. Conf. R. 1936–38. (Confidentiality waived). The record also reveals that SABIC kept records referring to the operations of the named PIF loan recipients in which it had an equity interest as its "projects". Conf. R. 1631–87. Records of the Saudi government list under the headings SABIC, PETROMIN and Saudi Airlines these other operations in which they were involved, indicating they are projects of these three companies. *See* Conf. R. 2015–18. The record thus contains substantial evidence to support Commerce's determination that the operations of other named recipients of PIF loans were projects of Saudia Airlines, SABIC or PETROMIN.

Hadeed asserts Commerce's determination is not in accordance with law because there is no evidence that the Saudi government "targeted" the three companies to receive PIF loans. Hadeed claims that Commerce has found a benefit bestowed upon a specific group of enterprises only where there was clear evidence of some form of selection or targeting by the foreign government. Hadeed cites *Final Affirmative Countervailing Duty Order: Fabricated Automotive Glass From Mexico,* 50 Fed. Reg. 1906, 1909 (Jan. 14, 1985), in which Commerce determined that it was unnecessary to reinvestigate a foreign debt rescheduling program since it had been found to be generally available and the petitioner "provided no evidence of government selection of participants, which is a criterion for countervailing programs that otherwise appear to be generally available."

Decisions of this Court require Commerce to conduct a *de facto* case by case analysis to determine whether a program provides a subsidy, or a bounty or grant, to "a specific enterprise or industry or group of enterprises or industries" within the meaning of section 1677(5)(B). *See, e.g., Alberta Pork Producers' Mktg. Bd.* v. *United States,* 11 CIT ——, 669 F. Supp 445 (1987); *Can-Am Corp.* v. *United States,* 11 CIT ——, 664 F. Supp. 1444 (1987); *PPG Indus., Inc.* v. *United States,* 11 CIT ——, 662 F. Supp. 258 (1987); *Al Tech Specialty Steel Corp.* v. *United States,* 11 CIT ——, 661 F. Supp. 1206 (1987). Under this "specificity test," proof of the intent of the foreign government to target or select specific enterprises or industries is not a prerequisite to the countervailability of the benefit provided.

Commerce determined, as a matter of fact, that the Saudi government provides PIF benefits to a specific group of enterprises, based on a finding that all PIF loans since 1978 and most PIF loans since 1973 have been provided to only three companies and their projects. The Court finds Commerce reasonably applied the specificity test and holds Commerce's determination that the Saudi government provides PIF loans to a specific group of enterprises is in accordance with law.

2. *Whether Commerce used a reasonable methodology to determine the countervailable benefit of the PIF loan.*

Commerce constructed a composite benchmark using a SIDF loan and a loan from a commercial bank in Saudi Arabia to determine whether Hadeed's PIF loan is on terms "inconsistent with commercial considerations" under 19 U.S.C. § 1677(5)(B)(i). Commerce determined that SIDF loans are not provided to a specific enterprise or industry or group of enterprises or industries. 51 Fed. Reg. at 4208.

Commerce found that "[f]or projects in which domestic ownership constitutes 50 percent or more of the total equity, the maximum SIDF loan amount is 50 percent of the total project costs." *Id.* Since Hadeed's level of domestic ownership was higher than 50%, and Hadeed's PIF loan was intended to cover 60% of project costs, Commerce constructed a composite benchmark with the maximum 50% SIDF loan and a 10% commercial bank loan.

Commerce compared the composite benchmark loan to the terms of Hadeed's PIF loan and determined that Hadeed's loan was given on terms inconsistent with commercial considerations. Commerce then calculated the benefit to Hadeed by applying

> * * * the benchmark loan terms to the total amount of PIF funds drawn down by Hadeed as of the end of the review period. Since Hadeed did not pay any service charges on the PIF loan during the review period, the net benefit to Hadeed during the review period consisted of the entire benchmark loan charges. We divided the benchmark loan charges by the value of Hadeed's sales for the review period to arrive at an estimated net bounty or grant of 4.91 percent *ad valorem.*

Id.

The domestic producers say Commerce's benchmark is not in accordance with law because 19 U.S.C. § 1677(5)(B)(i) requires as a "commercial" benchmark a loan from a competitive lending environment. They acknowledge that Commerce may use a government loan to construct the commercial benchmark as long as the government loans exist in a national market in which there is free competition between commercial and noncommercial loans. They argue, however, that a concessionary SIDF loan should not have been used in constructing the benchmark since Commerce found no long-term lending in Saudi Arabia except that sponsored by the government.

Under Commerce's interpretation of section 1677(5)(B)(i), the phrase "inconsistent with commercial considerations" refers to loans inconsistent with the alternative financing available in the lending environment of the country subject to investigation. Commerce will construct a "commercial" benchmark by using loans from either commercial banks or government sources in the country under investigation, as long as the government loans are not provided or required by government action to a specific enterprise or industry or group of enterprises or industries. *See* 51 Fed. Reg. at 4213 (citing *Final Affirmative Countervailing Duty Determination; Cold-Rolled Carbon Steel Flat-Rolled Products From Korea; and Final Negative Countervailing Duty Determination; Carbon Steel Structural Shapes From Korea,* 49 Fed. Reg. 47,284 (Dec. 3, 1984); *Certain Textile Mill Products and Apparel from Columbia; Suspension of Countervailing Duty Investigations,* 50 Fed. Reg. 9863 (March 12, 1985)); *see also* Subsidies Appendix, *Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 49 Fed. Reg. 18,006, 18,016 (April 26, 1984) (in situations where the respondent lacks actual borrowing experience equivalent to the long-term loan at issue the benchmark reflects the *national* average of commercial lending alternatives).

The statute is unclear as to whether the phrase "inconsistent with commercial considerations" means, as the domestic producers claim, preferential loans inconsistent with alternative loans available in a lending environment in which some market competition from the private sector exists or whether it could mean, as Commerce indicates, preferential loans inconsistent with alternative loans available in the lending environment of the country under investigation. The legislative history offers no clear direction as to how Congress intended this section to be interpreted.

If, as in this case, an agency's interpretation of a statute does not contravene "clearly discernible legislative intent," the Court must uphold such interpretation as long as it is "sufficiently reasonable." *Kelly* v. *Secretary, United States Dep't of Labor,* 812 F.2d 1378, 1380 (Fed. Cir. 1987); *American Lamb,* 785 F.2d at 1001.

The domestic producers' interpretation may be reasonable, but to sustain the agency's interpretation of an ambiguous statutory provision the Court "need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]." *Young* v. *Community Nutrition Institute,* 106 S. Ct. 2360, 2365 (1986) (quoting *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council,* 470 U.S. 116, 125 (1985)).

The Court finds it sufficiently reasonable for Commerce to interpret the phrase "commercial considerations" used in section

1677(5)(B)(i) as referring to alternative loans available in the lending market of the country under investigation. Although Commerce's interpretation leads to the construction of a benchmark that uses a government loan from a long-term lending market in which no private competition exists, the interpretation is sufficiently rational to preclude this Court from substituting its judgment from that of the agency.

The domestic producers claim Commerce could have used a benchmark based on a borrowing rate available in the international capital markets. The Court finds Commerce acted in accordance with law by refusing to use interest rates external to the Saudi marketplace which do not reflect a national average. It was not necessary for Commerce to resort to international lending rates as the "best information available" under 19 U.S.C. § 1677(e) (1982 & Supp. III 1985), since it found representative alternatives to a PIF loan within the Saudi lending market.

The domestic producers contend Commerce could have used an adjusted medium-term commercial bank rate in Saudi Arabia for comparison to the long-term PIF loan, asserting that Commerce has compared short-term interest rates to long-term rates in other investigations and that Commerce can compensate for the differences between long and short-term rates. Even if true, the "failure to use a discretionary alternative method does not constitute error when the agency uses a lawful second method." *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT 520, 525, 622 F. Supp. 1071, 1076 (1985); *Zenith Radio Corp.* v. *United States,* 9 CIT 110, 113, 606 F. Supp. 695, 698 (1985), *aff'd,* 783 F.2d. 184 (Fed. Cir. 1986). The question is whether a combination of a SIDF loan and a medium-term commercial bank loan is a lawful method.

The domestic producers say Commerce could not use the SIDF loan to construct a composite benchmark because Hadeed could not qualify for an SIDF loan. They argue that the SIDF was designed for industries and for projects smaller than Hadeed's venture.

Although Commerce found that the SIDF was established "to provide loans to small- and medium-sized private industries," it also found that the SIDF "can make loans for up to 15 years to any licensed company in Saudi Arabia which is at least 25 percent domestically owned and which has some private Saudi ownership." 51 Fed. Reg. at 4208. Commerce "chose the SIDF loan because SIDF is the only Saudi specialized credit institution, other than PIF, which provides industrial loans, and we [Commerce] verified that SIDF has provided loans to hundreds of companies in a wide variety of industries." *Id.* at 4216.

The record reveals Hadeed possessed the necessary qualifications for an SIDF loan, that such loans have been widely distributed, and that SIDF is the only Saudi specialized credit institution which lends to industrial or manufacturing projects. R. 83, 87, 598, 2385–2458, 3621–22; Conf. R. 2613, 2646–47. Substantial evidence

exists in the record, therefore, to support Commerce's determination that an SIDF loan "is most representative of what Hadeed would otherwise have had to pay for long-term loans in Saudi Arabia." 51 Fed. Reg. at 4208.

Hadeed contends Commerce should have used only the SIDF loan in constructing a benchmark, claiming a 10% commercial bank loan on terms comparable to the long-term PIF loan was not available from any source in Saudi Arabia during the investigatory period.

Commerce decided to use a 10% medium-term commercial bank loan as available in Saudi Arabia, stating: "Since the PIF loan covered 60 percent of Hadeed's total project costs, the benchmark was constructed under the assumption that Hadeed could have financed 50 percent of its total project costs with an SIDF loan (the maximum eligibility for a company with 50 percent Saudi ownership) and the remaining ten percent of project costs with a Saudi commercial bank loan." *Id.* Hadeed obtained a medium-term commercial bank loan for 10% of the project costs as required under the PIF loan program. *See* Conf. R. 2020, 2614. Commerce did not posit a hypothetical long-term commercial loan interest rate in its benchmark, but constructed the commercial bank portion of the benchmark "based on the fees paid by Hadeed on its medium-term commercial bank loan, including an average of the various bank fees charged to service the loan and the average 1984 commission fee." 51 Fed. Reg. at 4208. Although that 10% commercial bank loan was medium-term as opposed to long-term like the PIF loan, the Court finds it reasonable for Commerce to use it in constructing the benchmark designed to reflect what Hadeed otherwise would have had to pay in Saudi Arabia absent PIF lending.

Hadeed claims that the 10% commercial bank loan in the benchmark exaggerates the amount of benefit it received from the PIF loan. Hadeed argues that it is not necessary to include the 10% commercial bank loan in the benchmark because it had drawn down less than 50% of its costs from the 60% financing available pursuant to the PIF loan terms.

Commerce's benchmark is based on the express terms of the PIF loan agreement which allow Hadeed to draw down 60% of project costs. The fact that the information available to Commerce during the review period shows Hadeed had, to date, not drawn down the full 60% is not relevant to the construction of the benchmark. It is reasonable for Commerce to construct the benchmark using the express terms of the loan agreement. Commerce only countervailed the benefit Hadeed received from its PIF loan since Commerce calculated the subsidy to Hadeed using the amount of the PIF loan the available information proved Hadeed had drawn down. *See id.*

Hadeed also challenges the methodology Commerce used to measure the benefit of the PIF loan.

Commerce's usual methodology for measuring the benefit to a company receiving a preferential loan is to calculate the differences between such loan and a comparable benchmark, allocate that difference over the full term of the loan, and discount the benefit to the company for a given year to reflect the changing value of money over time. *See* Subsidies Appendix, 51 Fed. Reg. at 18,016–19. This methodology is used because loans have "a readily identifiable effect on the company over time." *Id.* at 18,019.

Commerce determined that it could not use its usual methodology in this case because "the terms of Hadeed's PIF loan * * * are not readily identifiable since Hadeed's future payments on the loan depend on future profitability." 51 Fed. Reg. at 4216. Commerce calculated the benefit to Hadeed from the PIF loan on a year-to-year basis rather than allocating the difference over the full term of the loan.

Hadeed argues Commerce should have adhered to its standard methodology, claiming that Commerce could have accurately estimated Hadeed's future profitability. The Court, however, finds it reasonable for Commerce not to speculate on Hadeed's uncertain future profitability. Calculation of the benefit in each year does not ignore Hadeed's potential profitability since Commerce subtracts any service charges Hadeed pays under the PIF loan agreement. In calculating the benefit during the review period no subtraction was necessary because Hadeed did not pay any service charges. *Id.* at 4208.

The Court finds the methodology Commerce used to determine the countervailable benefit of Hadeed's PIF loan reasonable and supported by substantial evidence and in accordance with law.

3. *Whether Commerce correctly characterized Hadeed's lease/purchase of a bulk material handling system as the provision of goods or services at preferential rates.*

The government of Saudi Arabia, acting through the Royal Commission of Jubail and Yanbu (Royal Commission), built two bulk ship unloaders and a conveyor belt system for Hadeed pursuant to a lease agreement. *Id.* at 4209. Under the lease agreement as amended, Hadeed must repay the equipment and construction costs, in "stepped yearly payments for twenty years" with "complete ownership transferral to the Company [Hadeed] after the costs are fully recovered by the Royal Commission." R. 1159, 1161.

Commerce found the transfer to be pursuant to a lease/purchase agreement and determined it was "[t]he provision of goods or services at preferential rates" under section 1677(5)(B)(ii). 51 Fed. Reg. at 4209.

The domestic producers claim that Commerce should have used section 1677(5)(B)(i) to characterize the transfer of this equipment as the provision of a loan "on terms inconsistent with commercial considerations." The domestic producers argue that if Commerce

would have looked to the economic substance of the transfer, rather than the form of the agreement, it would have found the arrangement to be the provision of a loan. They contend the transfer is akin to a purchase money finance transaction where a seller finances the purchase of equipment. Furthermore, they say that Hadeed's agreement is not like a standard lease/purchase agreement because "there is no lump-sum payment at the end of the financing term to pay for the residual value of the facility." Reply in Support of Domestic Producers' Motion for Judgment on the Agency Record, at 23.

In lease/purchase agreements, title generally does not pass until payment is complete. Title in the bulk material handling system would not pass to Hadeed under the terms of its agreement until the end of the twenty year period when payment is complete. R. 1161. Although there is no lump-sum payment at the end as in many lease/purchase arrangements, Hadeed's final payments are substantially higher than its earlier payments. *Id.;* Conf. R. 2189.

There is substantial evidence in the record to support Commerce's determination that the provision of the bulk material handling system was made pursuant to a lease/purchase agreement. As a lease/purchase agreement in form and substance, Commerce reasonably characterized this transfer as the provision of goods under section 1677(5)(B)(ii).

4. *Whether SABIC's transfer of the Jeddah Steel Rolling Company to Hadeed is a "provision of capital * * * on terms inconsistent with commercial considerations" under 19 U.S.C. § 1677(5)(B)(i).*

The Jeddah Steel Rolling Company (SULB) produces steel reinforcing bars at its steel rolling mill but has no facilities for producing carbon steel wire rod. 51 Fed. Reg. at 4210. In 1982, when SABIC was wholly owned by the Saudi government, SABIC acquired all of SULB's stock and transferred it to Hadeed in return for new Hadeed stock. Commerce found:

> The stock transfer, through which SULB became a wholly-owned subsidiary of Hadeed, represented a new investment decision distinct from the decision to construct Hadeed's facilities in Jubail. Therefore, an analysis of the sale of SULB to Hadeed must be based on information available as of December 1982. One of the key indicators used in the World Bank studies of the Hadeed project was the world price of steel reinforcing bars. We examined these price levels, as reported in the *Metals Bulletin,* for the 1979–1985 period. We found that by late 1982 actual world prices had decreased significantly from their levels in 1979 and 1980, when the World Bank studies were conducted. Because of the trend in prices from 1980 through 1982, we find that a reasonable investor would not have relied on these studies for the 1982 SULB investment.

51 Fed. Reg. at 4210.

Commerce concluded that "the declining world price levels would have made it appear doubtful in late 1982 that prices, during years in which Hadeed would be operating, would reach the level necessary to generate a sufficient rate of return on equity over the life of the project." *Id.* Commerce determined that the transfer was a "provision of capital * * * on terms inconsistent with commercial considerations" within the meaning of 19 U.S.C. § 1677(5)(B)(i).

Hadeed asserts that SABIC's transfer of SULB's stock should not have been considered a "provision of capital" within the meaning of the section because it did not provide Hadeed with cash or a cash-equivalent.

The statute does not explain the phrase "provision of capital," nor does the legislative history provide direction on how that phrase is to be interpreted. The statute, however, uses the term "capital" and not cash or cash-equivalents. The term "capital" can refer to "any accumulated factors of production capable of being owned." *Webster's Third New International Dictionary* 332 (1981). Commerce has treated the transfer of shares of one company to a second company, in exchange for equity ownership in the second company, as the provision of capital. *See, e.g., Final Affirmative Countervailing Duty Determinations; Certain Carbon Steel Products From Sweden,* 50 Fed. Reg. 33,375, 33,377–78 (Aug. 19, 1985); *Final Affirmative Countervailing Duty Determination; Industrial Nitrocellulose From France,* 48 Fed. Reg. 11,971, 11,973–74 (Mar. 22, 1983). In the absence of any legislative intent to the contrary, the Court finds it sufficiently reasonable for Commerce to interpret the phrase "provision of capital" in Section 1677(5)(B)(i) as referring to transfers of shares from one company to a second company.

Hadeed further claims that this transfer by SABIC was only a paper transaction involving the rearrangement of assets already owned by SABIC and not a provision of capital to Hadeed. The transfer of SULB, however, resulted in Hadeed becoming sole owner of SULB's assets, which included a steel rolling mill. Although the transfer rearranged SABIC's assets, Commerce could reasonably find there to be a provision of capital to Hadeed.

Hadeed also argues the transfer was not a provision of capital because Hadeed did not benefit from acquiring SULB. While important in evaluating the amount, if any, of a countervailable benefit to Hadeed, this does not affect the question of whether SABIC's transfer of SULB to Hadeed was a provision of capital.

The Court finds it sufficiently reasonable for Commerce to determine that SABIC's transfer of SULB to Hadeed constituted a "provision of capital" within the meaning of section 1677(5)(B)(i).

Hadeed claims the determination that it was unequityworthy at the time of the transfer is not supported by the record. Where a company's stock is not traded in a market, and thus there is no market-determined stock price, Commerce usually determines that the provisions of capital is "inconsistent with commercial considera-

tions" within the meaning of section 1677(5)(B)(i) if the company is not equityworthy at the time of the investment. "[A]n investment is consistent with commercial considerations if a reasonable investor could expect a reasonable rate of return on his investment within a reasonable period of time." *British Steel Corp.* v. *United States,* 10 CIT ——, 632 F. Supp. 59, 61 (1986).

Commerce found Hadeed unequityworthy at the time of the transfer because the world price levels of steel reinforcing bar, key indicators of Hadeed's future profitability, had declined such that a reasonable investor assessing Hadeed's future operations would conclude that Hadeed could not generate a sufficient return. The record contains substantial evidence to support this finding. Conf. R. 2476, 2754–57.

Although Hadeed points to evidence in the record which might justify an investment in it despite the projected decline in steel reinforcing bar prices, Brief in Support of Hadeed's Motion for Judgment on the Agency Record at 55–58, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Electric Indus. Co.* v. *United States,* 3 Fed. Cir. (T) 44, 51; 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 619–20 (1966); *Armstrong Bros. Tool Co.* v. *United States,* 67 CCPA 94, 95 n.4, 626 F.2d 168, 170 n.3 (1980)).

Hadeed contends Commerce applied the wrong standard in assessing whether the transfer of the SULB assets were "inconsistent with commercial considerations." Hadeed claims that SABIC's decision to make the transfer is a "follow-up investment" in a "start-up project" for a developing country properly evaluated by determining whether the on-going project has "lost all measure of commercial reasonableness," citing *Carbon Steel Wire Rod from Trinidad and Tobago Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 49 Fed. Reg. 480 (Jan. 4, 1984).

Trinidad and Tobago is a Commerce determination limited to its own facts. A Commerce determination discussing whether one company is equityworthy under a certain set of facts is insufficient to bind Commerce to a special standard of review for determining whether other companies are equityworthy in arguably similar circumstances. Commerce properly applied the standard in *British Steel Corp.* to determine that the transfer of assets to Hadeed was "inconsistent with commercial considerations" within the meaning of section 1677(5)(B)(i).

Hadeed finally argues that a benefit is countervailable under section 1677(5)(B)(i) only if pursuant to section 1677(5)(B) such benefit is "bestowed directly or indirectly on the manufacture, production, or export" of the product under investigation. Hadeed claims Commerce's determination to countervail SABIC's transfer of SULB is not supported by substantial evidence, arguing Commerce does not

explain how assets found to be devoted exclusively to the production of steel reinforcing bar, conferred any benefit, directly or indirectly, on Hadeed's manufacture, production or export of carbon steel wire rod, the product under investigation.

Defendant points to Commerce's finding that "SULB currently obtains its billets from Hadeed," 51 Fed. Reg. at 4210, and to a SULB product brochure which states "[a]lmost all of SULB's demand on billets is supplied from Jubail by Hadeed," R. 2672, 2674. Defendant claims: "It is reasonable to assume that Hadeed, by producing *all* the billets to be used both by Hadeed (to make wire rod) and by its new acquisition, SULB (to make [steel reinforcing bar]), derived a benefit since the billets destined for Hadeed's use in making wire rod would now be cheaper to produce, because Hadeed could produce greater quantities, than if Hadeed made only those billets for use in its own wire rod production." Defendant's brief in Opposition to Plaintiffs' Motions for Judgment on the Agency Record (emphasis in original) at 68. Defendant asserts Commerce clearly articulated this "economies of scale" rationale regarding billet production "because the path of the agency's decision-making process may reasonably be discerned," citing *Ceramica Regiomontana* v. *United States,* 810 F.2d 1137, 1139 (Fed. Cir. 1987). Defendant's Supplemental Brief at 3–14.

In *Ceramica Regiomontana,* our appellate court stated that a court may "uphold [an agency's] decision of less than ideal clarity if the agency's path [in its decision-making process] may reasonably be discerned." 810 F.2d at 1139 (quoting *Bowman Transportation* v. *Arkansas-Best Freight Sys.,* 419 U.S. 281, 286 (1974); *Colorado Interstate Gas Co.* v. *Federal Power Comm'n,* 324 U.S. 581, 595 (1945)). The Court finds, however, that the path of the agency's decision-making process in the present action is not discernible from the record.

The Court remands the action to Commerce for an explanation as to how acquisition of SULB benefited Hadeed's wire rod production. Commerce may support this explanation by evidence already on record or, if necessary, may collect additional information to supplement the record. The Court will review Commerce's explanation to determine if it is supported by substantial evidence on the record and is in accordance with law. If Commerce finds no benefit to Hadeed's wire rod production from acquisition of SULB, however, Commerce shall reduce the countervailing duty by the amount attributed to SULB's acquisition.

CONCLUSION

Commerce's final affirmative countervailing duty determination is remanded for an explanation as to how SABIC's transfer of SULB's assets to Hadeed bestowed a benefit "directly or indirectly on the manufacture, production, or export" of carbon steel wire rod by Hadeed within the meaning of section 1677(5)(B). All other find-

ings of Commerce which form the basis of the countervailing duty order on carbon steel wire rod from Saudi Arabia are sustained.

Commerce shall file the results of its remand with the Court within 45 days. Hadeed will thereafter have 15 days in which to file a brief on the remand results with the Court. Defendant and the domestic producers shall file a reply within 10 days after receipt of Hadeed's brief.

So ORDERED.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	
				Item
C87/199	Newman, S.J. November 12, 1987	Bourns, Trimpot Products Div.	81–4–00389, etc.	Item 6% allo und for sub con
C87/200	Newman, S.J. November 18, 1987	Bourns, Inc.	80–9–01553	Item 6% allo iten cos sub con
C87/201	Newman, S.J. November 18, 1987	Sigma Instruments, Inc.	81–12–01772	Item 7.7 allo und for sub ter
C87/202	Re, C.J. November 23, 1987	New York Merchandise Co.	81–7–00840	Item 5.1
C87/203	Aquilino, J November 23, 1987	Coral Springs Fabric Corp.	87–10–01005	Item sub Cat
C87/204	Restani, J. November 24, 1987	Intervisual Communications Inc.	86–11–01403	Item 14.

CLASSIFICATION DECISIONS

ASSESSED em No. and rate	HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
n 686.10 % with no llowance made nder item 807.00 r cost or value of bject metal ntacts	Item 686.10 6% with allowance made under item 807.00 for cost or value of subject metal contacts	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Potentiometers which incorporate metal and ceramic contacts
n 686.10 % with no llowance under em 807.00 for st or value of bject metal ntacts	Item 686.10 6% with allowance made under 807.00 for cost or value of subject metal contacts	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.d 930 (1984)	San Diego Potentiometers which incorporate metal and ceramic contacts
n 685.90 7% with no llowance made nder item 807.00 r cost or value of bject metal rminal pins	Item 685.90 7.7% with allowance made under item 807.00 for cost or value of subject metal terminal pins	Sigma Instruments, Inc. v. U.S., 5 CIT 90, *aff'd*, 724 F.2d 930 (1983)	San Diego Relays which incorporate metal terminal pins of U.S. origin
n 206.98 1%	Item A203.30 Free of duty	Agreed statement of facts	San Diego Woven wood sahtrays
n 384.0905 bject to Quota ategory 336	Item 384.0922 subject to Quota Category 351	Agreed statements of facts	Savannah Garments
n 737.95 .9%	Item 737.52 Free of duty	Agreed statement of facts	Los Angeles Mickey Mouse's Busy Farm

C87/205	DiCarlo, J. November 24, 1987	Border Brokerage Co.	78–2–00283	Item 6 4.5%
C87/206	Re, C.J. November 25, 1987	Glass Products, Inc.	82–4–00479	Items 5 546.5 Vari
C87/207	Restani, J. November 30, 1987	K. L. Dorfzaun Corp.	86–1–00117	Item 7 $.20 16.3
C87/208	DiCarlo, J. November 25, 1987	Border Brokerage Co.	78–4–00561	Item 6 5% Item 6 9.5% Item 6 9.5%

380.45 %	Item 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77–12–04978	Blaine Harvesting machinery & parts
546.52 .56, or 546.59 ious rates	Item A548.05 Free of duty	Glass Products, Inc. v. U.S. S.O. 85–40	Dallas Laredo Glass products
703.10 per lb. + %	Item A703.72 Free of duty	Agreed statement of facts	New York Certain women's rain hats
364.10	Item 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77–12–04978	Blaine Specially designed parts for Madill logging yarders
546.92 % 380.54 %			

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V87/326	Watson, J. November 23, 1987	W.J. Byrnes & Co.	246735A, etc.	Export value	F.o. 2 f. a
V87/327	Watson, J. November 23, 1987	W.J. Byrnes & Co.	257763A, etc.	Export value	F.o 2 f a
V87/328	Watson, J. November 23, 1987	W.J. Byrnes & Co.	266559A	Export value	Ap
V87/329	Watson, J. November 23, 1987	W.J. Byrnes & Co.	275956A	Export value	Ap
V87/330	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R58/5953	Export value	F
V87/331	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R58/23768, etc.	Export value	F
V87/332	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R59/3206, etc.	Export value	F
V87/333	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R59/6174, etc.	Export value	

ON DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs, etc.
o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk piece goods, etc.
ppraised values less 7.5% thereof	Agreed statement of facts	New York Silk piece goods, etc.
ppraised values less 7.5% thereof	Agreed statement of facts	New York Silk fabric
.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Wool rugs
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs, etc.
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk fabric
Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk fabrics

V87/334	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R59/7679	Export value
V87/335	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R60/210, etc.	Export value
V87/336	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R60/1289, etc.	Export value
V87/337	Watson, J. November 23, 1987	W.J. Byrnes & Co.	R61/16226, etc.	Export value
V87/338	DiCarlo, J. November 25, 1987	Wire Robe Industries, Ltd.	82-7-00973	Transaction value
V87/339	Restani, J. November 30, 1987	Intalco Aluminum Corp.	82-10-01402	Computed value

	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk fabric
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk fabric
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
e	Entered value less included foreign inland freight	Agreed statement of facts	Detroit Not stated
	Invoice unit values plus 6.18%	Agreed statement of facts	Blaine Calcined petroleum coke

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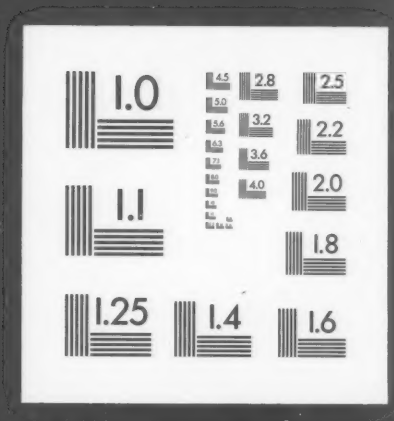
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